

***United States Court of Appeals  
for the Second Circuit***



**APPENDIX**





# 76-7360

In The  
**United States Court of Appeals**  
For The Second Circuit

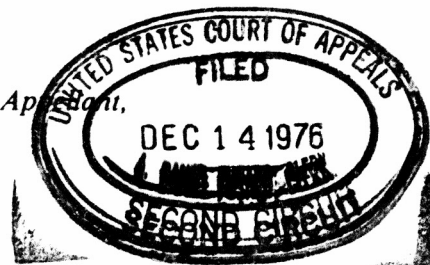
THERMAL UNIT CORPORATION,

Plaintiff-Appellant,

-against-

YORK-SHIPLEY, INC.

Defendant-Respondent.



*On Appeal from a Judgment of the United States District Court  
for the Eastern District of New York.*

## APPENDIX

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75C-481

## DOCKET ENTRIES

A

THERMAL UNIT CORP.

v

MARK SHIPLEY, INC.

DATE	NR.	PROCEEDINGS
1-1-75		Complaint filed. Summons issued. (1)
1/21/75		Summons ret'd and filed. Executed (2)
1-5-75		ANSWER filed. (3)
1-2-75		Copy of motion to strike counterclaim with letter dtd 5-30-75 attached filed. (4)
1-19-75		Motion to strike counterclaim ret 6-16-75 filed. (5)
6-25-75		Affirmation in opposition filed. (6)
6-27-75		Before NEAHER, J.-Case called. Pltff's motion to strike counterclaim granted. Order to be submitted.
7-15-75		By NEAHER, J.-Order dtd 7-14-75 dismissing the counterclaim filed. (7)
1-21-75		Before NEAHER, J.-Trial date set for 3-8-76. (non-jury)
1/29/76		Pre-Trial Memorandum of Law on behalf of Thermal Unit Corp. filed. (8)
3-31-76		Before NEAHER, J.- Case called Attys for both sides present Trial ordered and begun Pltff rests Trial cont'd to 4-1-76
4-1-76		Before NEAHER, J. - Case called. Attys for both sides present. Trial resumed. The court finds that pltff has failed to establish his 1st cause of action. As to 2nd cause of action-in favor of pltff and against def't and directs the entry of judgment on behalf of the pltff for the amount of \$4,195 and tax costs. Pltff to enter judgment. Trial concluded.
7-7-76		Pre trial memorandum of law of Thermal Unit Corp. filed. (9)
9-9-76		By NEAHER, J.-JUDGMENT dtd 6-8-76 dismissing the first cause of action. On the second cause of action thw pltff to recover of the def't the sum of \$4,100.00 filed. p/c (10)
12-28-76		Pltff's <u>notice of appeal</u> filed. Copy mailed to def't and C of A. (11)

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VERIFIED COMPLAINT  
(Dated March 31, 1975)(pp. 1a-4a)

1a

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

5C 481

-----X  
THERMAL UNIT CORPORATION

Plaintiff

- against -

COMPLAINT

YORK-SHIPLBY INC.

Defendant  
-----X

Plaintiff by and for its complaint, complaining of the Defendant by its Attorney, WILLIAM K. MADDEN, ESQ., respectfully alleges and shows the court as follows:

FIRST CAUSE OF ACTION

FIRST: That Plaintiff at all times hereinafter mentioned was and still is a corporation incorporated under the laws of the State of New York, having its principal place of business at West Hempstead, New York.

SECOND: That Defendant at all times hereinafter mentioned upon information and belief, was and still is a corporation incorporated under the laws of the State of Pennsylvania having its principal place of business at York, Pennsylvania.

THIRD: That the amount in controversy exceeds the sum of TEN THOUSAND DOLLARS, (\$10,000.00) exclusive of interest and costs.

FOURTH: That on or about August 1974 Plaintiff and Defendant entered into an agreement whereby Plaintiff agreed to purchase and the Defendant promised and agreed to manufacture certain goods, wares and merchandise consisting of a boiler to be

delivered to Plaintiff on or before December 1974.

FIFTH: That all conditions have been performed by Plaintiff pursuant to the contract but Defendant has at all times failed to perform said conditions of the contract.

SIXTH: That Plaintiff had entered into an agreement with a third party to sell and install said boiler; that Defendant had knowledge of this contract of Plaintiff; that because of the failure of Defendant to comply with the terms of the contract, Plaintiff was unable to fulfill its contract to the third party.

SEVENTH: That as a result of the acts of the Defendant the Plaintiff has been damaged in the amount of FIFTY THOUSAND DOLLARS (\$50,000.00) representing lost profits, loss of business customers and loss of good will.

#### SECOND CAUSE OF ACTION

EIGHTH: That Plaintiff repeats, reiterates and realleges with the same force and effect paragraphs designated "FIRST" through "THIRD" of the FIRST CAUSE OF ACTION.

NINTH: That on or about August 1974 Plaintiff and Defendant entered into an agreement whereby Plaintiff agreed to purchase and Defendant promised and agreed to manufacture certain goods, wares and merchandise consisting of three boilers to be delivered to Plaintiff on or before August 1974.

TENTH: That all conditions have been performed by Plaintiff pursuant to the contract but Defendant has at all times failed to perform said conditions of the contract.



ELEVENTH: That Plaintiff had entered into an agreement with a third party to sell and install said boilers; that Defendant had knowledge of this contract of Plaintiff; that because of failure of Defendant to comply with the terms of the contract Plaintiff was unable to fulfill its contract to the third party.

TWELFTH: That as a result of the acts of the Defendant the Plaintiff has been damaged in the amount of TWENTY FIVE THOUSAND DOLLARS (\$25,000.00) representing lost profits, loss of business customers and loss of good will.

WHEREFORE Plaintiff demands judgment against the Defendant on the FIRST CAUSE OF ACTION in the sum of FIFTY THOUSAND DOLLARS (\$50,000.00) and upon the SECOND CAUSE OF ACTION in the sum of TWENTY FIVE THOUSAND DOLLARS (\$25,000.00), together with interest costs and disbursements.

Dated: Garden City, New York  
March 31, 1975

WILLIAM K. MADDEN, ESQ.  
Attorney for Plaintiff  
821 Franklin Avenue  
Garden City, New York  
(516) 746-1133 11530

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X  
THERMAL - UNIT CORPORATION,

Plaintiff,

CORPORATE VERIFICATION

- again-t -

YORK-SHIPLEY, INC.

Defendant.  
-----X

STATE OF NEW YORK    ):  
COUNTY OF NASSAU    )

KENNETH PETERS, being duly sworn, deposes and says:  
He is the president of the THERMAL-UNIT CORPORATION,  
the plaintiff in the above entitled action which is a corporation  
created under and by virtue of the laws of the State of New York;  
that he has read the foregoing complaint and knows the contents  
thereof; that the same is true to his knowledge except as to the  
matters therein stated to be alleged upon information and belief  
and that as to those matters he believes them to be true.

\_\_\_\_\_  
KENNETH PETERS

SWORN TO BEFORE ME THIS

31st day of MARCH 1975

\_\_\_\_\_  
WILLIAM K. MADDEN

VERIFIED ANSWER  
(pp. 5a-6a)

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

----- -x

THERMAL UNIT CORPORATION,

Plaintiff,

VERIFIED ANSWER

- against -

YORK-SHIPLEY INC.

INDEX NO.  
75C 481

Defendant

----- -x

Defendant by its attorneys, GOLDMAN, HOROWITZ & CHERNO,  
for its answer to plaintiff's complaint herein alleges:

FIRST: Admits existence of agreement in writing alleged  
in paragraph FOURTH and refers to its terms including payment in  
advance of shipment to be made by plaintiff by certified check  
which plaintiff failed to make.

SECOND: Denies each and every allegation contained in  
paragraphs marked and numbered FIFTH, SIXTH, SEVENTH, TENTH,  
ELEVENTH and TWELFTH of plaintiff's complaint.

THIRD: Admits existence of agreement in writing alleged  
in paragraph NINTH and refers to its terms including payment in  
advance of shipment to be made by plaintiff by certified check  
with plaintiff failed to make.

*this payment was  
17% in advance*

AS AND FOR A SEPARATE AND DISTINCT COUNTERCLAIM

FOURTH: The defendant repeats and realleges each and

every allegation contained in paragraphs FIRST and SECOND HEREIN with the same force and effect as though hereafter fully set forth at length.

FIFTH: That on or about and between March 9, 1972, and September 18, 1973, defendant, at the special instance and request of the plaintiff, sold and delivered goods, wares and merchandise to the said plaintiff, on open account, at an agreed price and reasonable value on which there remains an unpaid balance of SEVEN THOUSAND NINE HUNDRED FORTY ONE and 43/100 (\$7,941.43) dollars.

SIXTH: That no part of the said balance of SEVEN THOUSAND NINE HUNDRED FORTY ONE and 43/100 (\$7,941.43) Dollars has been paid although demand for payment thereof has been duly made.

WHEREFORE defendant demands judgment dismissing plaintiff's complaint and for judgment on the counterclaim against the plaintiff in the sum of SEVEN THOUSAND NINE HUNDRED FORTY ONE and 43/100 (\$7,941.43) Dollars, together with the costs of this action.

GOLDMAN, HOROWITZ & CHERNO  
Attorneys for plaintiffs,  
Office and P.O. Address,  
390 E. Old Country Road,  
P.O. Box 630  
Mineola, N.Y. 11501

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## PETERS EXAMINATION BEFORE TRIAL

Peters

(pp. 7a-9a)

5

1 A This is a purchase order for York-Shipley,  
2  
3 this is our purchase order as accepted by York-Shipley.

4 MR. THALER: Off the record.

5 (Whereupon, a discussion was held off  
6 the record.)

7 Q I direct your attention to the term,  
8 "Certified Check in advance of shipment."

9 Did you send this certified check in ad-  
10 vance of shipment?

11 A Of course not.

12 Q You did not?

13 A The equipment wasn't ready. The check  
14 only goes when the equipment is ready.

15 Q Did you send a certified check in advance  
16 of shipment?

17 A No.

18 Q When did you request shipment, other than  
19 what's in the document?

20 A The date that is on the document.

21 Q The date says, approximately, 11/10/74?

22 A It does not say that. It stands corrected,  
23 11/10/74, or before.

24 Q It does say before. Let the record show  
25 it says B/4. How soon before November 10th, 1974, --



3 A Correct.

4 Q Did you issue one of a kind of those forms  
5 to York-Shipley?

6 A No.

7 Q Would you mark this for identification  
8 as Defendant's exhibit E.

9 (Whereupon, the above-mentioned document  
10 was marked as Defendant's exhibit E for identifi-  
11 cation this date.)

12 Q Now, on Defendant's exhibit D, the quota-  
13 tion concerning the second cause of action, did you send  
14 a check in advance to York-Shipley as provided for in  
15 the quotation?

16 A I couldn't.

17 Q I didn't ask you that. I asked you if  
18 you did?

19 A No.

20 Q Did you ever cancel that order?

21 A No.

22 Q Did you ever receive a notation from York-  
23 Shipley that the boiler was ready to be shipped?

24 A No.

25 Q I show you this document and ask you  
whether you received it, a copy or the original?



was marked as Defendant's exhibit G for identification, this date.)

Q I show you this document. Does that pertain to the second cause of action?

A Yes.

Q This is a request for a certified check, is that right?

A No.

Q In any event, this is a document dated 8/26/74, which pertains to a second cause of action.

Would you mark this as Defendant's exhibit number H for identification.

(Whereupon, the above-mentioned document was marked as Defendant's exhibit H for identification, this date.)

Q Does this letter dated August 26th, 1974, in reference to the second cause of action, which is a quote for eight eighty-five J?

A Yes.

Q You received that?

A Yes.

Q Would you mark this as Defendant's exhibit I for identification.

(Whereupon, the above-mentioned letter



## BRENNEMAN EXAMINATION BEFORE TRIAL

15

Brenneman

(pp. 10a-11a)

1 while you could not deliver the boiler discontinued for  
2 TUK Industries?

3 A As of a certain date, yes.

4 Q Was that date continually pushed back?

5 A I only know from looking at the record that  
6 there were numerous delivery dates given.

7 Q Any reason that you couldn't deliver a boiler  
8 to Imperial Finishers?

9 A Yes.

10 Q What was that reason?

11 A That reason I--I don't want to get these  
12 orders confused.

13 MR. TEALER: This is Exhibit D.

14 A That reason is that we did not have approval  
15 of the equipment for sale in New York City under the  
16 new D.A.R.

17 Q I show you what has been marked Plaintiff's  
18 Exhibit 7 for identification and ask you if you can  
19 identify it?

20 MR. TEALER: That was 6.

21 MR. MADDEN: I haven't introduced it yet.

22 Q This is a letter from Thermal-Unit Corporation  
23 to York-Shipley indicating that that company will not  
24





Brenneman

A For the satisfactory completion of the sale, yes. Our company policy was not to sell any boilers after a certain date for installation in New York City by anyone until such time as you received approval, unless the end user would hold us harmless.

MR. MADDEN: Off the record.

(Discussion held off the record)

Q Mr. Brenneman, was there any time that you sent correspondence to Thermal-Unit Corporation which said in effect, the boilers are completely ready, please send the money, we'll deliver.

A Not to my knowledge.

Q This City Department of Air Pollution Regulation that you are referring to, was that an actual law in July of 1974?

A Yes.

Q Was it a trend in the law?

MR. THALER: I have an objection. You are asking him a question of law. He is not a lawyer. What was told to him.

Q Do you understand the effective date of the New York City Department of Air Pollution Regulation?

A I read the regulation in the plane coming up



EXCERPTS OF PROCEEDINGS BEFORE HON. EDWARD R. NEAHER, U.S.D.J.  
ON MARCH 31, 1976 (pp.12a-85a)  
\* \* \* Peters/Direct

12a

1 DIRECT EXAMINATION

4

2 BY MR. MADDEN:

3 Q Mr. Peters, I would appreciate it if you'd keep  
4 your voice up so you could be clearly heard.

5 THE COURT: Turn that towards you and you can  
6 be heard.

7 Q Mr. Peters, are you employed? What is your  
8 occupation?

9 A I'm employed by Thermal Unit Corp.

10 Q In what capacity?

11 A President of the Corporation.

12 Q How long have you been president of Thermal  
13 Unit Corporation?

14 A Since 1970.

15 Q Could you briefly describe to the Court the  
16 manner of business in which Thermal Unit Corporation is  
17 engaged?

18 A Well, Thermal Unit Corporation is primarily  
19 engaged in the sale and installation of oil burners and boilers  
20 for industrial use; industrial or commercial use.

21 Q And personally how long have you been in this  
22 particular field of endeavor?

23 A I have been in this particular field since  
24 June of 1945.

25 Q And in the capacity of installing, the sale

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Peters/Direct

and installation of boilers, have you had occasion to do business with defendant York Shipley, Inc?

A Yes, in years prior to 1970 under my old company's circle combustion I did purchase York Shipley boilers and I did install them.

Q Since 1970 and up until the present date, have you had occasion to purchase boilers from York Shipley?

A Yes, numerous occasions.

Q When you say numerous occasions, if you can, can you make an accurate approximation of exactly how many occasions in the past 16 years?

A In the past 16 years or so?

Q Yes.

A It's in the hundreds.

Q Mr. Peters, on or about in the Spring of 1974, did you have occasion to receive a purchase from Tuck Industries?

A Yes, I did.

Q Where is Tuck Industries located, if you know?

A Their main office is put in Mt. Vernon; the plant that I received the purchase order was in Beacon; another plant of their's is in Beacon, New York.

THE CLERK: Document marked plaintiff's exhibit 1 for identification.

Peters/Direct

Q Mr. Peters, I show you what has been marked plaintiff's exhibit 1 for identification and ask you if you can identify it?

A Yes, I can. This is a purchase order from Tuck Industries to Thermal Unit Corp. in the amount of \$66,500 for a York Shipley 700 HP boiler.

Q And what is the date of that purchase order?

A The date of this is July 30th, 1974.

Q And does that purchase order state any terms?

A It says --

THE COURT: Just a minute. It's only marked at the moment for identification. I assume you expect to put it in evidence?

MR. MADDEN: Yes.

THE COURT: Do you wish to do that now?

MR. MADDEN: At this time I wish to offer plaintiff's exhibit one for identification.

MR. THALER: I would have to object, Your Honor, on the grounds of immateriality; in that the contract between the plaintiff and the defendant in this action is dated July 16, 1974, and the contract offered as plaintiff's exhibit one, which is between the plaintiff and its ultimate consumer is dated July 30th, 1974. I don't see how this contract has

Peters/Direct

anything to do with the contract between the parties here since it was subsequent to his ordering the purchase from him.

THE COURT: Perhaps that can be explained.

MR. MADDEN: You may wish to ask Mr. Peters further questions as to the background of that particular document, without referring to its contents.

Q Referring to the date that appears on that exhibit marked for identification, did you have occasion to have a telephone call or communications other than that exhibit with Tucker Industry, regarding the purchase of a boiler?

A Yes; several weeks prior to this, I was in their office.

THE COURT: You were where?

THE WITNESS: I was at Tuck Industries Office and we had agreed -- they had signed a formal contract outlining details more than this as the items of the boiler such as was given to York Shipley as an order, and that was in the early part of July, and they explained we should go ahead and order the boiler, everything was ok, but it would take some time for them to process, a process order; so therefore this order was evidently processed several weeks later.

1  
2 MR. THALER: I have to respectfully object,  
3 Your Honor, it's very difficult for the defendant to  
4 defend against a situation which appears to be developin  
5 here, where you are going out, you are making a contrac  
6 with one person, namely, the defendant and then you  
7 are going to see what kind of a good deal you are going  
8 to get with somebody else and get rid of it, so --

9 THE COURT: Well, --

10 MR. THALER: He was under contract with my  
11 client.

12 THE COURT: He said early in July. I don't  
13 know whether he has any means of pinpointing the exact  
14 date by early in July. He said several weeks prior to  
15 July 30th.

16 MR. THALER: Unless that incident in early July  
17 involved a memorandum in writing of our standing I  
18 don't see how it would be binding agreement with anyone

19 THE COURT: Perhaps there is some documentation  
20 that may have a bearing on that, I'm not sure.

21 You want something else marked for identificatio

22 THE CLERK: Four pages of documents dated July  
23 15, 1974, marked plaintiff's exhibit 6 for identificat

24 Q Mr. Peters, I show you what has been marked  
25 plaintiff's exhibit six for identification and ask if you

Peters/Direct

can identify it?

A Yes.

Q What do you identify that document as?

A This is a proposal in detail submitted to Tuck Industries regarding the work boiler, outlined in this purchase order.

Q What is the date of the document marked?

A July 15th.

Might I qualify what I said before? Is that all right I would like to say that the reason --

MR. THALER: I object to any reasons that this witness wants to testify to.

THE COURT: All right.

Q All right. As a result of your communication with Tuck Industries what if anything did you do?

A Well, as a result of my communication with Tuck Industries whereby they told me time was of the essence, I proceeded to order the boiler from York Shipley.

Q Did there come a time when you in fact placed an order for such boiler with York Shipley?

A Yes.

MR. MADDEN: At this time I offer into evidence plaintiff's exhibit one for identification and plaintiff's exhibit six for identification.

\* \* \*



Peters/Direct

MR. MADDEN: Yes, Your Honor.

THE COURT: Then do you propose to offer that contract in evidence?

MR. MADDEN: Yes.

THE COURT: All right.

DIRECT EXAMINATION (CONTINUING)

BY MR. MADDEN:

Q Mr. Peters, as a result of placing an order with York Shipley, Inc., did there come a time when you received a quotation from York Shipley?

A I did.

Q I show you what has been marked as plaintiff's exhibit two for identification, and ask if you can identify that?

A Yes, this is a quotation given to me by Combustion Accessories Corp., on this boiler, who was a representative of York Shipley in the area at the time.

Q And does that quotation, that quote the price that York Shipley was charging you?

A Yes, it does quote my total net cost for the boiler equipment, a certain amount.

Q Is that quotation set forth in the delivery date of this boiler?

A It sets forth the same delivery date.



Peters/Direct

1  
2 I requested the delivery date. We put here so it would be  
3 in accordance with the purchase order.

4 MR. THALER: Object to that, the document will  
5 speak for itself.

6 A It was the delivery date --

7 THE COURT: Just a minute. You might as well  
8 then offer that in evidence.

9 MR. MADDEN: I at this time offer in evidence  
10 plaintiff's exhibit two for identification.

11 MR. THALER: May I have a voir dire, if Your  
12 Honor, please?

13 THE COURT: You may.

14 VOIR DIRE EXAMINATION

15 BY MR. THALER:

16 Q This writing in red ink on the document, when  
17 was that put in?

18 A That was put in?

19 Q Yes.

20 A I couldn't tell you.

21 Q Whose handwriting is it?

22 A Ah, it could be my handwriting. It looks  
23 very much like it.

24 Q Now, the handwriting matter over there says  
25 "subject to" etc. etc. -- was that put in before or after,

\* \* \*

Peters/Direct

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MR. THALER: I object to when he's saying telling him --

THE COURT: Right.

Q Mr. Peters --

THE COURT: Well, do you object to the date. I assume it's dated.

MR. THALER: Apparently it's dated prior --

Q Mr. Peters, what is the date of the memo?  
August 9th, 1974.

Q Mr. Peters, does that memorandum make any mention of any manufacturing difficulties that York Shipley was having?

A It is not.

MR. THALER: Objection until it's in evidence.

THE COURT: You want to offer it in evidence?

MR. MADDEN: Your Honor, at this time I offer plaintiff's exhibit 4 marked for identification into evidence.

MR. THALER: No objection.

THE CLERK: Plaintiff's exhibit four received in evidence.

(Court looking at the plaintiff's exhibit 4.)

BY MR. MADDEN: (CONTINUING)

Q Did there come a time when you received a

Peters/Direct

memorandum from York Shipley indicating that York Shipley was having difficulty procuring materials from the manufacturer of the said boiler?

A Yes.

Q I show you what has been marked plaintiff's exhibit five for identification and ask you if you can identify it?

A Yes, I can.

Q What do you identify that as?

A As the memo saying -- problems were encountered in procuring material.

Q As a result of the problems that York Shipley alleged that they encountered, was the completion date for this boiler delayed?

A Back to January 6th, 1975.

MR. MADDEN: I offer into evidence plaintiff's exhibit five marked for identification.

MR. THALER: No objection.

THE COURT: All right, mark it in evidence.

THE CLERK: Plaintiff's exhibit five received in evidence.

Q Mr. Peters, I show you what has been marked plaintiff's exhibit seven for identification and ask if you can identify it.

Peters/Direct

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A Yes, I can.

Q What do you identify that as?

A Memo from the York Shipley stating that problems have been encountered procuring materials, schedule would be forthcoming.

MR. MADDEN: I offer plaintiff's exhibit seven into evidence.

MR. THALER: No objection.

THE CLERK: Plaintiff's exhibit seven received in evidence.

Q Mr. Peters, you have testified that you had prior dealings with York Shipley regarding the manufacturing and delivery of boilers; is that right?

A That's correct.

Q And can you testify as to a course of conduct that existed between Thermal Unit Corp. and York Shipley regarding the purchasing of these said boilers?

A Prior to the purchasing of these said boilers when boilers were ordered from York Shipley a delivery date would be given, and would be kept within a reasonable period of time. There must have been a few days or weeks later and sometimes they are on time or earlier; generally it was satisfactory.

Q When a boiler --

\* \* \*

Peters/Direct

1  
2 custom and usage, which I do not think is really  
3 applicable here in view of the very specific terms and  
4 conditions of the contract. In the course of a dealing  
5 they themselves have regulated their dealing under  
6 these contracts.

7 MR. THAYER: I would like to point out also  
8 respectfully the case of Cable Widener Inc., against  
9 Frederick and Son Company, 336 N.Y.S. 139, in which  
10 it was decided that there is no reason to resort to  
11 trade practices or evidence of a custom for interpreta-  
12 tion when a contract is unambiguous.

13 THE COURT: I don't think we are talking about  
14 trade practices, but there is such a thing as a course  
15 of dealing between parties which is something else  
16 again.

17 MR. THAYER: Course of dealing with the distinguish  
18 from a custom and usage.

19 THE COURT: I would distinguish it.

20 DIRECT EXAMINATION (CONTINUING)

21 BY MR. HADDEN:

22 Q You have testified that they made at least  
23 one hundred purchases from York Shipley?

24 A Yes.

25 Q And those one hundred purchases, did they follow

Peters/Direct

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a course of dealing?

A Yes.

Q Would you describe that course of dealing?

A Course of dealing was the equipment would be ordered, a delivery date would be given, and this delivery date would be adhered to generally plus or a reasonable period of time which in our dealings was acceptable, within a week or two.

Q When the boiler was manufactured and ready to be shipped, did you receive any written notification from York Shipley?

A In all prior dealings I always received a written notification that the boiler was ready for shipment. In some cases they would then notify me the money was necessary, please accept a check, boiler is ready.

Q I show you what has been marked plaintiff's exhibit 3 for identification, and ask you if you can identify that document?

A Yes.

Q What do you identify that document as?

A York Shipley invoice stating the boiler is ready, something I would normally receive, telling me that I now owe them the money, send them the money and the boiler will be shipped.

Peters/Direct

THE COURT: Has that been marked for identification?

MR. MADDEN: Yes.

Plaintiff's exhibit three for identification.

THE WITNESS: It's typical of the ones I would receive on all prior orders.

MR. MADDEN: I offer plaintiff's exhibit three in evidence.

MR. THALER: I would like to have a voir-dire.

VOIR-DIRE EXAMINATION

BY MR. THALER:

Q Is it your contention that this document, plaintiff's exhibit three for identification, is presented for the purpose of a similar transaction to the one in the lawsuit here to show the course of dealing.

A I don't quite understand your question.

Q Let me rephrase the question.

Plaintiff's exhibit three is an ordinary hot water boiler for \$7,000.00 and we are talking about something made special with 78 foot --

MR. THALER: Objection. I object to this on the grounds that it is not similar to what we are talking about in this case, so it wouldn't be a true course of dealings because it's apples and oranges.

\* \* \*

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Peters/Direct

exhibit 7 for identification.

Q I show you what has been marked as plaintiff's exhibit eleven for identification and ask if you can identify that?

A Yes, I can.

Q What do you identify that document as?

A Quotations from Combustion Accessories for three boilers for Imperial Finishing.

MR. MADDEN: I offer plaintiff's exhibit eleven for identification into evidence.

MR. THALER: No objection.

Q Mr. Peters, does part of plaintiff's exhibit eleven show the price for these boilers?

A Yes, it does. It shows my total net cost, \$9,158.00.

Q On the second page of that document, directing your attention to the second page of that document, does it set forth the cost of additional items to be placed?

A Yes, an additional cost of \$2,363.00.

Q Would it be accurate to say that it costs -- the cost of the boiler to you would be the sum total of those two figures or exactly \$21,151.00?

A That is correct.

THE COURT: What was the date of that?



Peters-direct

THE WITNESS: July 22nd, 1974.

THE COURT: Has that been marked in evidence now?

THE CLERK: Plaintiff's exhibit eleven received in evidence.

THE COURT: I would like to ask a question in connection with this particular quotation, plaintiff's exhibit eleven. I notice under terms it says one percent check in advance.

How did you construe that?

THE WITNESS: How did I construe it? When the equipment was finished and ready to be shipped that I would mail the check for the amount designated, the sum total of those two less one percent, then immediately upon receipt of that check the equipment would be shipped.

THE COURT: Less -- you mean --

THE WITNESS: In other words, there were \$24,000 the total less the \$240 would be my net cost. My net cost would be one percent less than stated on that particular quotation.

THE COURT: The word one percent check in advance really meant a check in advance for the amount of the invoices less one percent.

THE WITNESS: A discount of one percent, like

1  
2 two percent-- this is one percent. As soon as  
3 the equipment was ready to be shipped they would notify  
4 me and I would send a check in that amount less one  
5 percent.

6 Q Mr. Peters, I show you what has been marked  
7 the plaintiff's exhibit twelve for identification and ask  
8 you if you can identify it?

9 A Yes.

10 Q What do you identify that as?

11 A A memo from York Shipley to Thermal Unit  
Corp., regarding the cost, terms.

13 Q What is the date of that memo?

14 A August 26th, 1974.

15 MR. THALER: Objection.

16 MR. MADDEN: I offer plaintiff's exhibit 12  
17 into evidence.

18 THE CLERK: Plaintiff's exhibit 12 received in  
19 evidence.

20 DIRECT EXAMINATION (continuing)

21 BY MR. MADDEN:

22 Q Now, did there come a time when York Shipley  
23 contacted you and indicated that they would not ship this  
24 boiler?

25 A Yes, there was.

Peters-direct

1  
2 Q And would you describe the circumstances of  
3 that communication?

4 A Well, they said --

5 MR. THALER: Excuse me. If there is a communica-  
6 tion in writing, it would speak for itself.

7 MR. MADDEN: I'm asking it may not be.

8 THE COURT: Well, all right. Well perhaps the  
9 better way to go about it is to ask him did he  
10 receive any communication in writing.

11 THE WITNESS: We received not in writing, not  
12 initially --

13 THE COURT: Well then, we better know to the best  
14 of your ability -- and recollect the name of a person--  
15 did it come by telephone?

16 THE WITNESS: Yes.

17 THE COURT: The name of the person who communicated  
18 to you and the approximate date, can you do that?

19 THE WITNESS: I would say that it was approxi-  
20 mately, roughly a month or so after placing the order  
21 that Harry Neilson from York Shipley called and said  
22 that they couldn't ship the boilers without receiving  
23 a letter of authorization -- responsibility for the  
24 boilers -- to meet the standards of the Department of  
25 Air Pollution and Resources in New York City; that

1  
2 they would not ship them unless they had that release,  
3 and I subsequently wrote a letter giving them the  
4 release and absolving them of any responsibility for  
5 the boilers meeting those standards.

6 Q Mr. Peters, I show you what has been marked  
7 plaintiff's exhibit --

8 THE CLERK: Document dated September 25, 1974,  
9 marked as plaintiff's exhibit 13 for identification.

10 Q I ask you if you can identify plaintiff's  
11 exhibit 13 for identification?

12 A Yes, I can; a letter from Thermal Unit to York  
13 Shipley stating that I would not hold them responsible.

14 THE COURT: That's the letter you just described.

15 MR. MADDEN: Yes.

16 THE COURT: Show it to Mr. Thaler.

17 MR. MADDEN: I'll offer plaintiff's exhibit 13  
18 for identification.

19 MR. THALER: No objection.

20 THE COURT: Plaintiff exhibit 13 received in  
21 evidence.

22 Q Referring to the plaintiff's exhibit 13,  
23 in evidence, Mr. Peters, would you note the date of that  
24 letter?

25 A 25th of September, 1974.

1  
2 THE COURT: Letter dated March 7th, 1975,  
3 marked as plaintiff's exhibit 14 for identification.

4 Q Mr. Peters, I show you what has been marked  
5 plaintiff's exhibit 14 for identification and ask you if you  
6 can identify that?

7 A Yes.

8 Q What do you identify that as?

9 A Letter from York Shipley to me, dated March  
10 7, 1975.

11 Q And the subject matter of that letter, Mr .  
12 Peters?

13 A Well, the subject matter --

14 MR. THALER: The letter speaks for itself.

15 THE COURT: It's relating to the DDr approval.

16 MR. MADDEN: I offer plaintiff's exhibit 14  
17 for identification into evidence.

18 MR. THALER: No objection.

19 THE CLERK: Plaintiff's exhibit 14 received  
20 in evidence.

21 Q Now, Mr. Peters, I direct your attention to the  
22 first sentence in the second paragraph of plaintiff's exhibit  
23 14, where it's made references to the price increases.

24 What do you construe that sentence as meaning?

25 A It means that they were stuck with the price

\* \* \*

Peters-direct

1  
2 We designed and built and installed the rear door  
3 for which we guaranteed this boiler would not need repairs,  
4 replacement for three years, you see, repairs of this type,  
5 highly technical repairs and this was our association.

6 MR. TAYLOR: I object, Your Honor.

7 He could be doing a lot of business and losing  
8 money. It doesn't then mean that he has good will  
9 lost because he did a lot of business. The books and  
10 records which show whether he worked at a profit, his  
11 corporation may have worked at a loss.

12 THE COURT: You could argue that certainly,  
13 and you'll have opportunity to cross-examine him, I  
14 presume.

15 Q Mr. Peters, subsequent to the incident in  
16 question regarding the Tuck Industries, have you conducted  
17 any business with Tuck Industries?

18 A Since this cancellation; yes, sir, not other  
19 than one emergency call that they asked us to respond, nobody  
20 could help them out to get something repaired, it was a  
21 one shot situation.

22 Q Did you ever have a conversation with an  
23 officer of Tuck Industries as to why they conducted no  
24 further business with York Shipley.

25 A They were dissatisfied with this whole situation.

Peters-direct

1  
2 MR. THALER: Objection.

3 THE COURT: We do have a hearsay problem here.

4 MR. MADDEN: Yes, Your Honor.

5 THE COURT: And again, I really think such a  
6 discussion becomes too speculative.

7 MR. MADDEN: I follow Your Honor.

8 THE COURT: I mean, if one can be given excuses  
9 while I don't deal with you anymore which may or may  
10 not be true, but in the final analysis, what really  
11 matters here, what they were, I take it, no further  
12 relationships were between Tuck and your client, except  
13 for this one that you recall.

14 THE WITNESS: That's correct.

15 Q (Mr. Madden continuing) Prior to the incident  
16 in suit, you conduct business on a regular basis, with  
17 Imperial Finishers?

18 A No, I did not.

19 Q In other words, the incident in suit was the  
20 only business dealing that you had with Imperial Finishers?

21 A Yes.

22 Q Since the incident in suit, have you had any  
23 business dealings with Imperial Finishers?

24 A No, sir.

25 MR. THALER: I'll object to that because of the

1  
2 documentary evidence, it shows that they went into  
3 bankruptcy, it's immaterial. If they were in bankruptcy  
4 they couldn't give them any business anyway.

5 THE COURT: I thought it was Chapter XI.

6 MR. THALER: Chapter XI is bankruptcy.

7 THE COURT: But they can continue to do business?

8 MR. MADDEN: My understanding is that good will  
9 goes to the reputation of a well conducted business,  
10 not so much business that is brought in, and that  
11 is the purpose of my asking the question.

12 MR. THALER: You want to go into reputation?  
13 I have no objection if you want to go into reputation.

14 MR. MADDEN: I have no further questions.  
15 Thank you.

16 THE COURT: I was going to give you a recess.  
17 I have counsel here in another matter who wishes to  
18 address the Court, so suppose we interrupt this until  
19 12 o'clock.

20 (Whereupon a short recess was had.)

21 (After recess.)

22 THE COURT: Are we ready to proceed, Mr.  
23 Thaler?

24 MR. THALER: Yes, Your Honor.

25 CROSS EXAMINATION

\* \* \*

BY MR. THALER:



1  
2 receive notification when goods were ready and they  
3 expected to make the payment. If you have some evi-  
4 dence other than differences in open account, which  
5 you may have, of course, I don't know what your case  
6 is going to be, that's another thing, but I don't  
7 think, first of all I think it goes beyond the scope  
8 of cross-examination in any event, but I don't think  
9 it's particularly relevant or probative with respect  
10 to the issue that has been developed on the plaintiff's  
11 case.

12 CROSS EXAMINATION (Continuing)

13 BY MR. TAYLOR:

14 Q Now, in your association with Combustion and  
15 York Shipley and Thermal, were you ever made aware of production  
16 delays because of raw material not being available?

17 A No, not as such.

18 Q You testified that you have been president of  
19 the Thermal Unit Corporation since 1970 and you have been  
20 in this field since 1945?

21 A Correct.

22 Q Do you recall any instance of coal strikes or  
23 steel strikes since 1945?

24 A There have been many strikes in many industries  
25 since then.

1  
2 Q I'm only asking you about your own industry,  
3 you are in that field since 1945 and with Thermal since 1970,  
4 so in your field, you recall strikes in the coal and steel  
5 industries?

6 A I recall strikes in my field.

7 Q Do you recall when you were a representative  
8 or an agent or even as a principal that many orders were  
9 delayed because of such strikes?

10 A No; that is not true.

11 Q You don't recall it?

12 A It's not true.

13 Q You are saying that no orders regarding steel  
14 were ever delayed because of a strike?

15 A I never had delays.

16 Q I am talking about in the field?

17 A I don't know about other people. I only know  
18 what happened to me, sir.

19 Q Do you recall in the Korean War when all ship-  
20 ment of steel --

21 THE COURT: I think we're getting a little  
22 remote here.

23 Q As a rep and agent when you went out and solicited  
24 business for York, did you ever discuss with prospective  
25 customers -- were you asked by them would there be any

Peters cross

1  
2 problems in the event of a strike or unavailability of  
3 raw material?

4 A I was asked.

5 Q And how would you answer it?

6 A I would answer it by absolutely not, because  
7 York Shipley maintains a large inventory of raw materials.

8 Q Now on the Tuck boiler, do you know for a fact  
9 whether they had an inventory to meet this particular production  
10 schedule?

11 A No, I have no way of checking.

12 Q Now, if we show you later as well through  
13 Mr. Brennan --

14 MR. MADDEN: Show him now.

15 I'll object.

16 Q Have you had excess to York Shipley's records  
17 with Bethlehem Steel and their inventory records?

18 A No.

19 Q So you did not know whether they had the  
20 raw materials for this boiler?

21 A I do not.

22 Q Now, in your purchase order with York Shipley,  
23 plaintiff's Exhibit 2A, you notice the legend, "Subject to  
24 cancellation without penalty if delivery is not as outlined"?

25 A That is correct.

Peters-cross

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Q There is no question about that in your mind if delivery was not made as outlined?

A That's correct.

Q And nevertheless you object to the fact that it's been cancelled?

A Yes.

Q So that language means nothing to you?

A Which language?

Q That you wrote in?

A It means a lot to me.

Q But it means something other than what it says?

A No, sir.

Q Did you read the back of the contract, the terms on the back?

A I have read it in the past years; yes.

Q When you signed this particular one, 2A, did you read the conditions incorporated on the back?

A I am familiar with it.

Q You are familiar with paragraph 1 "York Shipley shall not be triable for delivery if such failure or delay is caused by strike differences, etc."

You are familiar with that, you read that, you are familiar with it?

A Right.

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Peterson-Redirect

MR. MADDEN: I asked him --

THE WITNESS: They told me.

THE COURT: Well, that testimony is already in the case.

I don't understand the need for repetition in any event. He testified previously on cross-examination that the reason Tuck placed the order for York Shipley was they already had such boilers and that's what they insisted upon.

Q Mr. Peterson, you testified that the Tuck deal was cancelled out. Can you explain the circumstances of that final cancellation?

A Well, it dragged on with all these delays up to November and then into January 26th and then there was talk about January 20th and this thing just went along and there was no, you might say official cancellation -- I might have used the word fizzled out, it just fizzled out, time ran out on us, everything ran out on us and they just said "We can't use it any longer."

MR. THALER: I object and move to strike anything after "There was no official cancellation."

MR. MADDEN: I asked Mr. Peterson to describe his understanding of the cancellation, which I believe he did, your Honor.

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## Peterson-Redirect

Q Did you ever have telephone conversations with representatives of York Shipley that you need this boiler by a certain date?

A Numerous conversations, every week.

Q Every week?

A Oh, at least once or twice.

MR. MADDEN: Plaintiff's Exhibit 8.

Q On cross examination Mr. Thaler directed your attention to the sentence that reads "As a matter of fact the steel for the subject boiler has just arrived from New York." Do you recall that? Do you recall that Mr. Thaler's -- Mr. Thaler directing your attention --

A I recall Mr. Thaler's question, yes, sir.

Q And did you ever receive a letter from York Shipley Inc. stating that that sentence was not true?

A Absolutely not.

Q Now, to your recollection, Mr. Thaler, in the years you have done business with York Shipley did any other steel strike or coal strike prevent the compliance of York Shipley with the manufacture and delivery of any boilers?

MR. THALER: Object, your Honor. He is impeaching his witness because his witness said

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## Peterson-Redirect

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MR. THALER: No, York Shipley is claiming that the material wasn't available for reasons beyond their control.

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In addition they have --

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THE COURT: Well, is there something in evidence, I mean of a documentary nature, on that?

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MR. THALER: Yes, these --

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THE COURT: May I see it, because I would like to --

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MR. THALER: Plaintiff's five, due to problems of procuring materials.

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Plaintiff's -- I think he had three of those.

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Plaintiff's 7, due to problems. And also the March 20th, which is Plaintiff's nine. Do you have that up there?

19

THE WITNESS: Nine is here, Mr. Thaler, yes.

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MR. THALER: Let me see nine.

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THE COURT: Well, none of these exhibits, however, say anything more than problems encountered and/or delays in production scheduling and the last one dated March 20th, 1975 simple refers to "As you are aware, this was delayed due to the delay

42a

## Peterson-Redirect

1  
2 by our supplier in furnishing steel for the fabri-  
3 cation.

4 Now, is there something upon receipt of  
5 the steel we were advised" -- is there any exhibit  
6 that the steel just arrived or something to that  
7 effect? May I see that?

8 THE WITNESS: It's a paragraph down.

9 (Continued on the next page.)  
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43a

Peterson-Redirect

THE COURT: I don't see anything in here that really suggests anything about strikes. I think that's the -- that's fully unnecessary.

MR. MADDEN: I have no further questions.

MR. THALER: I have one or two.

REXCROSS EXAMINATION

BY MR. THALER:

Q Now, you mentioned that you cancelled the Emulsion contract because of the Town of Hempstead, right?

A Yes, sir.

Q Did you cancel it before you got the telegram saying that they wouldn't ship unless you made the payment?

A I couldn't recall if it was before or after the date of the telegram.

Q Well, obviously --

A I remember making the phone call. I'm quite certain, reasonably certain, it was before the telegram.

Q Well, can you tell me why --

A Reasonably certain, but I couldn't give you a date.

Q Can you tell me why if York Shipley accepted your cancellation they would send you a telegram that they

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Brenneman-Direct

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Q Do you recall a coal strike in December of

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1974?

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A Yes.

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Q What effect did that have on procurement of

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this material?

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A The order for the plates required for this

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Tuck Tape job is, as I mentioned earlier, was made

9

with Bethlehem Steel. Those steel mills -- incidentally it

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had to be placed with Bethlehem because of the large size

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of the plate.

12

The other mills discontinued producing the

13

larger plates, because they were not as profitable to them

14

as the smaller plates.

15

Q Are you saying that the only supplier for the

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raw material for this Tuck contract was Bethlehem Steel?

17

A That's right. And this was a move by the

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steel mills to try, I suppose, to make the greatest

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profit out of the steel that they did have available.

20

Bethlehem Mill at Sparrow's Point, Maryland,

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which is their eastern mill for steel plates, is a coke

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mill, so during -- after the coal strike had started

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they advised us that they were going to have to, should the

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Sparrow's Point plant because of the coke shake, run

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really low, so that they started cooling down their furnaces,

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Brenneman-Direct

which is a gradual operation as I understand it,  
and did close down, which further delayed the delivery  
of the steel in this particular order.

Q Was there anything in the control of York  
Shipley Inc. that could have facilitated the procurement  
of material to accelerate the shipment of this boiler?

A No, I -- I personally did everything that  
I feel could have been done.

See, each of the four mills from whom we  
were buying had put all of their customers on an allotment  
basis based on 1972 purchases. The economy was booming  
and everybody's needs were great.

The only amount of steel we could get was  
the 1972 volume that we had purchased. Therefore we --  
we couldn't go to a new mill and get an allotment.

MR. MADDEN: Your Honor, I believe that the  
question has been asked and answered.

We're getting a long explanation here.

THE COURT: Well -

MR. MADDEN: I don't mean to cut the defendant  
off, but I don't think --

THE COURT: All right.

MR. THALER: I will ask another question.

THE COURT: Yes.

\* \* \*

1  
2 THE CLERK: Civil cause on trial Thermal Unit  
3 Corp. versus York Shipley, Inc.

4 MR. MADDEN: I wonder if you would take up a  
5 matter of law, Judge.

6 THE COURT: What's on your mind?

7 MR. MADDEN: Judge, from the tenor of the  
8 direction of Mr. Brennenman, I understand that the  
9 defendant is claiming with respect to the Tuck Indus-  
10 tries impossibility of performance with respect to the  
11 imperial instant, some arrangement with the DAR  
12 regulation in New York. I believe these are affirma-  
13 tive defenses and the pleadings state in either one of  
14 these affirmative defenses I believe, that the affirma-  
15 tive defense must be stated in order for it to be  
16 maintained at the time of trial.

17 MR. THALER: Well, I think that insofar as the  
18 paragraph in the answer, which refer to the terms of  
19 the contract being sued upon that sufficiently opens  
20 the door to that defense. In other words the paragraph  
21 say and refers to its terms including payment, etc.,  
22 so by referring to the materials of the contract it  
23 puts into issue --

24 MR. MADDEN: It refers to its terms including  
25 payment in advance of shipment, that was the defense.

1  
2 MR. THALER: Terms including -- it doesn't say  
3 limited to payment. Whatever terms are in the contract  
4 on the back thereof which provides for certain contin-  
5 gencies as paragraph 1 and paragraph 2, where it  
6 specifically says York Shipley is not liable in any  
7 entity. Even if it wasn't a strike or some kind of  
8 commercial impracticability, so that the contract be  
9 in evidence includes all the terms in it and, of course,  
10 under the federal rules I think with simple lethy plead-  
11 ings is not as strick as it states.

12 MR. MADDEN: Prior to the witness resuming the  
13 witness stand, there was no statement that the defen-  
14 dant was relying upon a <sup>1M</sup>possibility of performance in  
15 the first cause of action. As there was nothing said  
16 of this in the examination before trial of Mr.  
17 Brennenman.

18 MR. THALER: I would move to conform the plead-  
19 ings to the proof, he can't plead surprise. At this  
20 late time to come up with what appears to be a  
21 technicality, although I believe it's not well taken.

22 MR. MADDEN: I could recommend there has never  
23 been a question of impossibility due to the impossibi-  
24 lity of the steel industry in the time in question.

25 THE COURT: Well, Mr. Madden, I'm inclined to

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Q Is it your claim that there existed in the steel industry in the fall of 1974 a situation -- a strike situation made it impossible for York Shipley to perform?

A Yes.

Q You testified that you took some trips to these various steel mills?

A Yes.

Q And what was the purpose of these trips?

A I testified yesterday the main purpose was to keep our company in operation because we were so short of steel that we were faced with a potential shut-down the month of September 1974.

Q And this shortage of steel was attributable to what cause?

A There was the booming economy first of all, the steel mills were behind schedule on deliveries of most customers' orders; they were pushing promised delivery dates back, they were lacking tonnage to certain customers eliminating other customers. In one case Bethlehem Steel, fall of '74 skipped allotments for two months in an attempt to catch up on deliveries; on top of that, there was a coal strike in November 1974 resulting in a shut-down and also slow-down of Bethlehem Steel, so it was a combination of all those factors as well as a shortage of steel scrape. We had

1  
2 stage is the letter of March 20, 1975, written by our sales  
3 manager, where he describes the status of the three orders.

4 Q But the boiler wasn't manufactured until when?

5 A The boiler was finished March 18th. It was not  
6 trimmed, the cylinder was finished, you trim it off to the  
7 specific specification of an order, different controls.

8 Q Did you ever send any communication to Peters  
9 saying that the boiler had been manufactured?

10 A I stated that to my knowledge --

11 Q Yes or no.

12 A Not to my knowledge.

13 Q Now --

14 A I still refer you to the letter of March 20th  
15 asking Peters to give us some answers from that order.

16 Q Did you ever send a communication to Peters  
17 that the boilers are ready, please send your certified check?

18 A We never sent a notice to a customer telling  
19 him that the boiler is finished. We wrote a letter March  
20 20th asking him the status of orders.

21 Q Can you identify --

22 A Advising him we had been informed his customer  
23 does not want the unit.

24 Q Can you identify Exhibit 3?

25 A This is an invoice.

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Q What did you say about the delays and what did he agree to about the delays?

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A After receiving information from the factory what the delays were, and I explained to Mr. Peters about the steel situation, we did not have the steel we had anticipated shipping date from the mill to the factory, it would be impossible for me sitting up in New York City not knowing what the situation was, when the shortages were starting to occur.

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(Continued next page.)

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Q As a result of Mr. Peters incessant inquiry you would call York and find out what the heck is going on?

A Yes.

Q What did York tell you?

A Each time I called there was an explanation why there was a delay.

Q What was the explanation?

A Give me a chance I'll tell you. You are getting a little excited. The explanation was exactly as Leverne Brennenman testified.

Q What was the explanation?

A The explanation I received was that they had not received the plate -- the placement was on order, they were promised delivery date and every time I called the date was changed, there were delays and delays and delays.

Q What did you tell Mr. Peters?

A Exactly what I'm telling you.

Q Did you say to Mr. Peters as soon as we get it in we'll manufacture?

A What would I tell him.

Q You kept stringing him along?

A There was evidence in writing, copies to my office of delivery dates, promises that were broken, re-promises.

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Q Who made those promises?

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A York Shipley.

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Q And who broke those delivery dates?

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A I think their suppliers did, I don't think they

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did.

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Q Who broke those delivery dates that went into

8

your office?

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A Copies of memorandums from York Shipley to me.

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Q York Shipley broke the delivery date?

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A Right.

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Q Now, Mr. Janssens, I show you Plaintiff's

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Exhibit 4 and ask you to read aloud that first full sentence.

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A The first sentence is: "This is to advise that

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suborders will be shipped upon receipt of your certified

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check in advance" do you want me to continue?

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Q No. Any mention there of delivery, problem in

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production?

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A Not in that memorandum.

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Q Was a certified check in advance? Was there any

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real reason for not fulfilling that order?

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A Nothing to do with it.

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MR. MADDEN: No further questions.

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THE COURT: Well, would this be a good time to

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suspend for lunch. We will meet at 2 o'clock.

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between Tuck Industries and Thermal Corporation.

Mr. Peters testified that after his initial contact with the president of Tuck Industries and after, I believe on several occasions appeared, conferred with the matters with the president of Tuck and at Tuck's offices prior to executing Exhibit 1. He contacted and placed an order with York Shipley, York, Pennsylvania; Tuck Industries was desirous of securing an additional boiler by the same manufacturer who had manufactured the other boilers, to wit, York Shipley Incorporated.

Mr. Peters testified that he had placed his order with York Shipley as a result of placing this order a quotation duly executed by the corporate officers, and the responsible representatives at York shipley was issued to Thermal Corporation.

Thermal Corporation, this is Plaintiff's Exhibit 2 of Exhibit 2 in evidence, and it sets forth the date of the execution of this quotation being July 16, 1974, and the terms of the agreement, namely, particularly described boiler which was to be delivered on or about November 10, 1974, or as was mentioned in the document B-4. It's indicated by the figure B/4. This document was accepted by Mr. Peters, his signature appears as president of Thermal Corporation and by

## Madden-summation

Mr. Janssens representing York Shipley Corporation.

The subject matter of the contract is not, according to the marked pleadings in dispute, the answer interposed by York Shipley -- I refer particularly, refer to the third paragraph of the answer, admits the existence in writing alleged in Plaintiff's Exhibit Paragraph 9 in the complaint of actually the existence of a contract is not in dispute.

Now, subsequent to issuing the aforementioned quotation, York Shipley issued to the plaintiff a memorandum, Plaintiff's Exhibit 4, which states "This is to advise that the subject order will be shipped upon receipt of your certified check in advance, the amount of the order is as follows -- setting forth the selling price less 1 percent handling charge anticipated shipping date is the week of November 25, 1974.

THE COURT: That exhibit is what?

MR. MADDEN: Exhibit 4.

THE COURT: That's the Imperial?

MR. MADDEN: Yes.

The Court could bear with me for just one moment.

Now, referring to Plaintiff Exhibit 4, there is no mention of manufacturing difficulties or any

## Madden-summation

difficulties with respect to securing materials necessary for the manufacture of boilers. This is the first indication the plaintiff contends of the subjective intent of the defendant. As the document refers merely to the certified check to be produced in advance of shipment and states the shipping date, the date has been delayed to November 25, 1974.

THE COURT: What exhibit is that?

MR. MADDEN: Exhibit 4.

THE COURT: The same exhibit 4?

MR. MADDEN: The same exhibit 4; but I make the particular point that there is no indication in this exhibit that there was a difficulty in manufacturing or securing the steel for the purposes of manufacturing, and again, they mentioned that the date of delivery will be November 25, 1974, which is already beyond the original delivery date agreed upon in the quotation of November 10, 1974.

Now, we heard from Mr. Peters who testified that he had a prior cost, established cost of doing business with York Shipley, and that he had prior transactions with York Shipley, and in no prior transaction had he received a memorandum similar to Plaintiff's Exhibit No. 4. In fact, Mr. Peters

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described indeed, when an item is ready, has been manufactured and is ready to be shipped then it is required, the requirement is of Thermal Fuel to forward a certified check, at that point he receives -- example -- which is Plaintiff's Exhibit 3, this blue invoice. Mr. Brennenman testified -- yes, this is the normal and customary procedure when the articles manufactured, when as indeed ready for shipment the invoice goes out to the customer, the customer sends a certified check in advance of shipment, and the shipment is made. There was never any notification that the boiler, and I'm directing my attention to Tuck, was ever ready for shipment.

Now, the applicable uniform commercial law provision regarding the course of dealing, I maintain is Section 1-205 Uniform Commercial Code, which states "a course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as established in a common basis of understanding for interpreting their expressions."

Subdivision 4 specifically states "expressed terms of an agreement and applicable course of dealing shall be construed whenever reasonable as consistent

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Hadden-summation

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with each other."

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I'm saying notwithstanding -- if they have any force at all, there was a prior course of dealing which would nullify those provisions. The attention is the defendant is not coming in here with clean hands by falling back on the provision in the back of the quotation, but as of yet in the history of the document, and in the history of the testimony, there is no indication of a material problem with reference to the production of this Tuck boiler; and then there comes September 30th -- excuse me -- this would be October 9th, when an additional memorandum is received by Thermal Corporation from York Shipley, Exhibit 5, which is a form letter, sets forth the order number. It says, "Tuck" -- a form letter with the problems encountered in procuring material -- sort of an omnibus thing, the shipping promise has been delayed til the week of January 16, 1974, we have no specific mention in this document of problems that Mr. Brennenman claims he encountered with Bethlehem Steel and the other steel manufacturers; this is a proforma mimeographed disclaimer sent out, all contrary to the course of dealings which prior existed between these parties, and it will be noted on this

## Madden-summation

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2 memorandum, Plaintiff's Exhibit 5, there is no mention  
3 of a certified check in advance which was mentioned in  
4 Plaintiff's Exhibit 4. The August 9th memorandum,  
5 sort of dropped that demand.

6 In this latest memorandum, Exhibit 5, as I  
7 mentioned, York Shipley gives no mention of a  
8 certified check in advance. There is no mention of the  
9 production problem and there is just a moving back of  
10 the production date.

11 The next correspondence Peters received from  
12 the exhibits are out of order, and I make reference,  
13 we have an Exhibit 7 in the time chronological sequence,  
14 would proceed; 5, 7, is the same memorandum which is  
15 dated September 30, 1974 and also said "Due to  
16 problems" -- all again, no mention of any production  
17 delay.

18 We now have a letter dated November 5, 1974  
19 coming to Ken Peters from York Shipley and second  
20 paragraph states: "As a matter of fact the steel for  
21 the subject order has just arrived in New York."

22 This letters gives us the true and first  
23 indication, I believe, of the intentions of the  
24 party, last paragraph -- last paragraph refers to  
25 intention of York Shipley -- "We were offered to finish



## Madden-summation

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2 the boiler and restore the same until 1975, deliver and  
3 maintain the original selling price. Now Ken, you are  
4 a businessman, and know you purchased the boiler at a  
5 very good price, in fact the boiler has gone up  
6 approximately 17 percent since the order was received;  
7 also to hold the boiler price would cost you 12 percent  
8 interest cost and to make it short, we have two  
9 alternative propositions, we furnish the boiler and  
10 invoice to you and we ship the boiler to be shipped in  
11 New York warehouse." And it goes on, naturally there  
12 is a third choice, that would be the formality to  
13 formally cancel the order.

14 Here we get the first indication of the  
15 subjective intent of the defendant, and that is they  
16 entered a bad and poor business deal, their profit  
17 margin was not as much as they anticipated, perhaps  
18 indeed the costs of manufacturing did increase and  
19 this whole Tuck thing would have been better off for  
20 them to abandon the manufacturing of this item if they  
21 could.

22 THE COURT: What exhibit was that?

23 MR. MADDEN: This was Exhibit 8.

24 Mr. Peters, and I believe the testimony is  
25 fairly uniform, incessantly contacted York on a regular

## Madden-summation

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2 basis, perhaps two, three times a week, "Where is this  
3 Tuck boiler"?

4 In the meantime Mr. Peters notified Tuck of the  
5 delays of the shipment of the manufacturing boiler from  
6 York Shipley. The shipment date being pushed back  
7 further and further, and if the Court will bear in mind,  
8 the original date set in mind was delivery on or about  
9 November 10, 1974.

10 Now, finally, as I view the situation, Mr.  
11 Peters being as persistent as he is, constantly  
12 prevailed upon York for production of this boiler and  
13 York replied on March 20, 1975 with Plaintiff's Exhibit  
14 9, a letter from York Shipley to Thermal Unit and the  
15 paragraph with reference to Tuck Industries states as  
16 follows:

17 "You are aware that this boiler was delayed  
18 due to the delay by our supplier in furnishing steel  
19 for fabrication. Upon receipt of the steel we are  
20 advised that Tuck requested this boiler. Further  
21 delay til the fall of '75."

22 Mr. Brennenman testified that he didn't know  
23 who requested that, he said he had no conversation with  
24 Peters and he had no conversation with Tuck, but,  
25 however, the second to last paragraph, I believe it's a

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2 dead giveaway: "In order for us to put in order this  
3 production it will be required to update our selling  
4 price to your current price level of \$42,934, wh ch is  
5 approximately a \$7,000 increase over the prior agreed  
6 to price."

7 And I believe that was the intention of the  
8 party.

9 Also denoted I am continually reading from the  
10 letter, and from my last quote of that figure  
11 "In view of your refusal to pay your past due account  
12 and failed to submit the advance payment, we require a  
13 downpayment from your company of 25 percent."

14 We certainly have a change of heart from the  
15 original demand of forward certified check, which was  
16 referred to in Exhibit 4.

17 "This is to advise suborder to be shipped,  
18 receive your certified check in advance."

19 The parties seem to be oscillating, the  
20 defendant seemed to be oscillating back and forth all  
21 in an attempt to salvage -- but apparently a bad  
22 business deal.

23 If I can refer back to Exhibit 8, the letter  
24 dated November 5 from York to Thermal, Mr. Brennenman  
25 testified that the sentence which states: "As a matter

## Madden-summation

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of fact, the steel from subject just arrived from

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New York."

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He states it's inaccurate, not correct. However, that's a very material sentence and no sensible letter came out of the office of York to Thermal advising Thermal that it was an inaccurate statement.

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Now, Mr. Brennenman testified with respect to the order he placed -- taking two sheets to make one boiler. He testified that the purchase price, that the Tuck boiler was the first in line to be manufactured. It's the position, and I believe proof will bear this out, the testimony from the witnesses, that intention of York Shipley was to force Ken Peters and Thermal out of the deal by continuing to say that they could not receive the material for production; and that they would go ahead and manufacture the boiler for perhaps one of the other three clients, or they would manufacture it for indeed Tuck, sort of like a checkers game. If Tuck doesn't want to pay or Thermal doesn't want to pay the now price of \$42,000, then they don't lose the boiler, it doesn't become scrap, it goes to the second man in line.

Mr. Brennenman was unable to testify to contractual --

## Madden-summation

MR. THALER: My objection was sustained.

MR. MADDEN: I'm giving my recollection of the evidence, your Honor. I believe your recollection will prevail here.

I will now direct my attention to the Imperial Finishers issue.

MR. Peters testified that he contacted the owners of Imperial Finishers and contracted with them for the purpose of three boilers; Peters testified as to the circumstances surrounding the consummation of Plaintiff's Exhibit 18-A in evidence; subsequent to issuing a quote from Thermal to Imperial, Mr. Peters then contacted York or contemporaneous in the quote, he contacted York and placed the order and received back a quotation from York for the three boilers; the quotation that York mailed back to Mr. Peters states approximate date of shipment, four to six weeks, the price for these boilers was the combined sum \$1,958 which was the price for the three boilers. The terms of the contract state 1 percent, check in advance, and testimony will bear out when the boiler was manufactured on the dock and ready to be shipped. They received a blue piece of paper. Mr. Peters sent the certified check and the boilers are sent. It is

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## Madden-summation

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the position of the defendant that the boilers did

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not comply with regulation of the Air Resources

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Department, and, therefore, the boilers would not be

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shipped.

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Now, Mr. Peters testified that he had telephonic

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communication with executive officers of York Shipley

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and their salesmen, they made him aware of their

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demand for DAR approval.

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(Continued next page.)

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1-6 1 He testified that pursuant to his phone conversation sent them a hold harmless agreement. There is no dispute the agreement he sent was a hold harmless agreement, it's whether it was acceptable to York Shipley. Mr. Brennenman said his purpose for seeking a hold back, his company had sold the boiler to A & S in Brooklyn; A & S had difficulty getting the DAR approval. In order to secure payment rather than -- whether or not the approval can be secured for the use of a boiler in New York City, Mr. Brennenman said unless a hold harmless is taken back from the consumer that the boilers will not be shipped, and Mr. Peters gave the hold harmless agreement. It's the contention of the plaintiff that Mr. Peters was the ultimate consumer, he had no duty or obligation to reveal to York Shipley, who was going to use these boilers. It was not the terms of the agreement. The terms of the agreement were 1%, certified check in advance as soon as he got the notification when the boilers were ready for shipment. He sent the certified check in for the purposes of argument. I don't think it's really germane to whom the boilers are to be manufactured.

25 Now, in the history of events concerning this

1 demand for DAR approval, the exhibits will bear the  
2 fact that there was no written demand for DAR approval  
3 till March 7, 1975, and the quotation received from  
4 York Shipley was dated July 22, 1974. There is an  
5 indication that there was some telephonic communica-  
6 tion. However, there was no written communication.  
7 It's only recently that the defendant is so eager to  
8 acquire DAR approval. Again, it is the contention  
9 that the defendant realized that he made a bad busi-  
10 ness deal and was attempting to back out of the deal  
11 by one reason or the other. The boilers that are  
12 involved with the Imperial Finishers matters are the  
13 smaller boilers than the one involved with Tuck. The  
14 one involved with Tuck, you had perhaps indeed ordered  
15 the material from Bethlehem Steel, so you could use  
16 the excuse the material wasn't ready, but that excuse  
17 doesn't hold weight with Imperial. Although the  
18 boilers were in the factory, they just had to be  
19 assembled and shipped out; they had to use some other  
20 excuse, some other excuse. I maintain the used this  
21 DAR excuse. It was a bad business deal and they were  
22 interested in making out. It's interesting to note  
23 that exhibit 12, the first memorandum sent to Mr.  
24 Peters regarding Imperial Finishers make no mention  
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2 of DAR -- required DAR approval. This memorandum  
3 simply states "This is to advise that the suborder  
4 will be shipped upon receipt of your certified check  
5 in advance. The amount of the order is as follows:  
6 Therefore your certified check should be in the amount  
7 of \$21,000" etc. -- but there is no mention of DAR  
8 approval.

9 The contention of the plaintiff and the defen-  
10 dant are for an excuse to get out of a bad business  
11 deal. The question was brought up, what if anything  
12 did Mr. Peters do with respect to Tuck, to mitigate his  
13 damages, and Mr. Peters testified, "Well -- " when he  
14 got the feeling, inclination that there was a problem  
15 in respect to this deal, they contacted a second  
16 manufacturer of this particular boiler and received a  
17 quotation from Secon Equipment Corporation. The  
18 quotation and the supporting letter was marked Exhibit  
19 15. After receiving this quotation from Secon Mr.  
20 Peters wrote Tuck Industries and -- if I could read --  
21 "We regret to inform you that I've just received a  
22 call -- we still can't get them to put anything in  
23 writing from York Shipley saying that the only emphasis,  
24 the way they would hold your boiler would be payment  
25 made before January 16, 1975" -- it goes on -- "Previous

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2 price of Cleaver Brooks Boiler is \$750 more than the  
3 prepurchase order. We sincerely hope that you know  
4 our company doesn't have control over this.

5 THE COURT: What number is that.

6 MR. MADDEN: That's Plaintiff's Exhibit 16  
7 in evidence.

8 If I could direct my attention to the Imperial  
9 matter. We have the Peters' release from the DAR  
10 dated September 1974. "This is to confirm our con-  
11 versation that we will not hold you responsible for  
12 meeting the criteria with the New York City Department  
13 of Air Pollution on three boilers ordered on the above  
14 number".

15 THE COURT: And that's what?

16 MR. MADDEN: Exhibit 13; Six months after this  
17 exhibit was issued by Mr. Peters, six months later,  
18 New York Shipley sent back a letter dated March 7, '75,  
19 Exhibit 14, which is a demand for DAR approval. There  
20 was no written demand from York Shipley in that  
21 intervening period of time. It's a contention that  
22 here we get the hint that York Shipley is concerned  
23 about not being able to manufacture, I suggest, the  
24 Imperial Boiler at the agreed upon price. They want  
25 to up the price. Mr. Peters testified that to his

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2 knowledge -- I'll start on that again. We attempted  
3 to show that in fact on at least one other occasion  
4 York Shipley sent a boiler to New York City, which was  
5 used in New York City known to be used in New York  
6 City after the July 1, 1973 directive of the DAR rules.  
7 I believe it will be conceded that -- and I'm  
8 specifically referring to Harte & Company, Mr.  
9 Brennenman testified that in June of 1973 he shipped  
10 to New York City a boiler which Mr. Peters testified  
11 it was not fired. In other words, operated for the  
12 first time in all of '73 after the operative date.  
13 If Mr. Brennenman had such a good faith concern for  
14 the welfare of his clients and customers, I submit,  
15 that he should have cleaned up, made sure the boiler  
16 met the DAR requirements whether it was shipped in  
17 May or June, if he knew it was going to be used after  
18 July 1st.

19 I could direct my attention to the area of the  
20 course of doing business. Mr. Peters testified in  
21 his sixteen years with several associates with York  
22 Shipley, been a part of hundreds of sales of boilers,  
23 and it was usual and customary for him to receive a  
24 notification that the boilers were in fact completed  
25 and ready for treatment and then he would mail a

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1 of the position of the plaintiff that the course of  
2 dealing controls here. The expressed terms of that  
3 agreement and applicable course of dealing, usage of  
4 trade shall be construed whenever reasonable and  
5 consistent with each other but when such construction  
6 is unreasonably expressed terms control both course  
7 of dealing and use of trade, and course of dealings  
8 controls the use of trade. What we have here is  
9 course of dealing, which is a control consideration  
10 in respect to what may be on the back of the quotation.  
11 I believe that completes my interpretation of the  
12 evidence as it's been presented. If the Court has  
13 anything that it would like me to direct my attention  
14 to I would be happy to.

15  
16 THE COURT: Let me hear from Mr. Thaler.

17 MR. THALER: If Your Honor please, actually  
18 we have a simple proposition here which Hornbrooke  
19 Law would probably cover here.

20 What we have to look at here, what would  
21 reasonable persons do confronted by the situation  
22 which has been testified to? Are we to believe that  
23 Mr. Peters was actually a customer in the Caveat Emptor  
24 buyer beware situation. Here's a man since 1945 has  
25 been in this business, he has worked for York

1 Shipley, he has worked for Combustion Accessories  
2 Corporation as an agent and a representative for York  
3 Shipley and has handled these matters not only in  
4 obtaining contracts for York, but for Cleaver Brooks  
5 that Combustion Accessories dealt with. He's not a  
6 buyer beware individual. If he isn't, he should be  
7 or should have been familiar with procurement with  
8 delays, with price structures. There is no doubt that  
9 the documentary evidence indicates what happens with  
10 prices, irrespective of the reason for delays. In the  
11 agreement between York and Thermal, these contingencies  
12 are provided for in the agreement between Thermal and  
13 Tuck with the quotation that Thermal gave to Tuck,  
14 and with Tuck's purchase order. You have the same  
15 causes and terms on the back of the contract concern-  
16 ing options to cancel by either party if there is a  
17 delay in shipment. What happens when there is an  
18 increase in price by supplier, nobody in this Court-  
19 room has lived in a vacuum in the last twenty, thirty  
20 years. All arrangements in contract expressly men-  
21 tion what happens when there are cost of living  
22 acceleration and even custom and usage. If there  
23 wasn't a written contract no supplier would sell some-  
24 thing for less than it cost them to buy, I don't care  
25

1  
2 what you call it, people in business, in this country  
3 do not sell for less than what it cost them to buy.

4 Now, Mr. Peters did not dispute Mr. Janssens'  
5 testimony about the ten or even more conversations  
6 concerning delivery. Mr. Peters has not shown any  
7 objection to the time that the delay messages went  
8 out, plaintiff's 4, 5 and 7, I believe. What would  
9 a prudent man do when he's delayed to the point of  
10 exhaustion, he would do something that Mr. Peters did  
11 not do here. Mr. Peters understood the industry and  
12 he went along, and he even wrote to Tuck. You have  
13 the plaintiff's Exhibit 16 to Tuck Industries saying  
14 Thermal Unit can't be responsible for the delays  
15 caused by York Shipley.

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17 (Continued on next page.)  
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2 MR. THALER: Now, in Exhibits 45 and 7, the  
3 notices that went out which spoke of due to delays and  
4 so forth, did Mr. Peters testify that he made any  
5 inquiries as to what the difficulties were?

6 Mr. Madden seems to believe or I think he  
7 believes because he is in the "no business," that the  
8 mere sending of, "due to problems encountered in  
9 procuring materials," that that meant nothing to  
10 Mr. Peters because it didn't say, "because of a coal  
11 strike," or whatever, but to Mr. Peters what that means  
12 is, "Due to problems of procurement."

13 So I say is there in evidence or testimony as to  
14 what did Mr. Peters do to inquire as to what were the  
15 difficulties? Did he go to Bethlehem Steel, did he  
16 go anyplace? Is there anything in the record to  
17 indicate Mr. Peters was satisfied with the nomenclature  
18 of defendant's 45 and 7 or his conversations with  
19 Mr. Janssens, and that this was something that the  
20 people in this industry have to "bite the bullet" and  
21 live with.

22 Now, Mr. Peters in his quotation provided  
23 something on the front of Plaintiff's Exhibit 2-A  
24 because obviously having read the back of it that says  
25 that York Shipley would not be liable for any failure

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to deliver or for any delay in effecting delivery, paragraph 1 on the reverse side, Mr. Peters felt while, well, you know, if they don't have to deliver then they are not liable, I want the same thing, so I am writing subject to cancellation without penalty if delivery is not as outlined, so that while there is mutuality of consideration rendered to all contracts by the operation of law, Mr. Peters made sure that this would exist because the contract seemed to him to be one sided for York Shipley because York could have no liability if there was a delay in delivery, so he provided that there should not be any misunderstanding that Thermal Unit would not be responsible or liable in the event that they didn't want to take delivery for some reason -- and it doesn't say what reason, it could even be a financial reason. So that this question of custom and usage is not applicable here.

Now the Uniform Commercial Code, Section 1205 states, as backed up by the case of Rothstein versus Kerr that the parties may contract expressly in accordance with custom, contrary to custom or in the absence of custom and the express agreement governs and the existence or absence of custom is immaterial. So here we have a situation where, sure, the Uniform



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2 Commercial Code provides for contingencies, but you  
3 don't pick out a contingency from the Uniform  
4 Commercial Code and apply it to the case at bar.

5 You have a case here where the contract  
6 provides expressly that which is going to happen if  
7 there is delay in shipment, what is going to happen in  
8 ninety days, and the price goes up, and if there is  
9 an increase in price, then there may be cancellation,  
10 and so forth. Of course usage in dealing and in  
11 usage of the trade is not applicable because it has  
12 been provided for by the parties contractually.

13 Now the Uniform Commercial Code has been  
14 adopted in the State of Pennsylvania and in the State  
15 of New York, so that there is no conflict of laws as  
16 to whether the contract here were accepted in  
17 Pennsylvania or in New York, it is the same law which  
18 is involved.

19 There is nothing in any of these contracts  
20 which would indicate that time is of the essence.  
21 "Approximate date of shipment," the term "approximate  
22 date of shipment," in some instances depends upon the  
23 circumstances. As a matter of fact it has been held  
24 in the New York State Courts that it may go even as far  
25 as two years or more, depending.

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such a contention on Mr. Madden's part. There are no records produced by the plaintiff, Thermal Unit, no information to rebut the inventory records, the production records and the purchase order records between York Shipley and Bethlehem Steel.

Mr. Peters was not supplied, from my hearing of the testimony of yesterday and today of Mr. Brennenman, as to what the reasons were, the coal strike, a coke strike and the shortage of steel, et cetera. He had ample opportunity to come into Court to prove that Mr. Brennenman's reasons for the delay, York Shipley's reason for delay was not as represented by the testimony.

Now Section 2-615 of the Uniform Commercial Code provides among other things that where you have a contract and delivery is involved that the seller must notify the buyer that there will be delay or non-delivery, and when allocation is required estimate the time of delivery. Now here, the seller, York Shipley, has complied with the Uniform Commercial Code, Section 215, and indeed with the contract, the terms of the contract, and has notified the buyer, seasonably, I would say, too, so that the pendulum swings to Thermal Unit, regardless of whether it is excusable or

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2 legitimate or whatever because he gets notification  
3 that there is going to be delay and what does he do,  
4 he does nothing. Now he can ask from now to doomsday,  
5 "When are we going to get it," to Mr. Janssens. He  
6 might as well say to a married woman, When are you  
7 going to have a baby, he can ask it every day, but  
8 once a woman becomes pregnant we know it is nine months.  
9 Until we got the steel in December of 1974, then we  
10 knew that this 25 ton boiler could be ready by March,  
11 And this is exactly what happened, by March it was  
12 ready, and pursuant to the terms of the contract and  
13 pursuant to the terms of Defendant's Exhibit C, the  
14 letter of March 20th went out saying that we now need  
15 25 percent before putting the trim on and 75 percent  
16 before shipment, and the price would be pursuant to  
17 the terms, and Mr. Janssens does nothing except cancel.  
18 Well, fine, fine, that is his prerogative, he cancels.

19 Now, Mr. Janasens could have exercised his  
20 right to take it pursuant to the terms that are  
21 outlined in the contract which provides for such a  
22 contingency, but he doesn't want to do it because the  
23 price is higher or he didn't want to do it for other  
24 reasons so he decided to cancel. He can't have his  
25 cake and eat it, that is now seek damages.

7 1  
2 Mr. Janssens admitted in his testimony that  
3 from the purchase order of July 15, 1974 that this was  
4 a case where he had to reply quickly after the boiler  
5 was manufactured and say, "I don't want any more, I am  
6 cancelling it." He knew then that York Shipley wasn't  
7 going to ask him for damages.

8 Now talking about damages, Mr. Peters would like  
9 the Court to believe that the 750 horsepower 25  
10 boiler can be installed and hooked up all for \$7,500.  
11 Well, since the burden of proof on the loss of profit  
12 is on Thermal Unit, they have not met that burden and  
13 I say that for the following reasons:

14 The cases in New York hold that the measure of  
15 loss of profit is not the difference between the  
16 purchase price of your material and the sales price to  
17 your customer. In other words Thermal Unit could buy  
18 something for \$1,000 and sell it for \$2,000 and on the  
19 face of it it looks like that if he didn't get it to  
20 make the sale that he loses \$1,000. But unless there  
21 is testimony and books and records, it is also  
22 possible that you could operate at a loss and you can  
23 buy something for \$1,000, sell it for \$2,000 and as a  
24 result of the transaction have a loss of \$1,000 or go  
25 into the red.

8 1  
2 Your Honor, we have no testimony or records  
3 here to show what his overhead fixed expense was, what  
4 the salaries of all of the officers of the corporation  
5 were, whether he did business or whether he did not do  
6 business. So that you can theoretically have a  
7 \$30,000 boiler to be sold for \$60,000 and not make  
8 \$30,000 in net profit.

9 Now they have the burden of proving this and  
10 the Court should not be the one to rely on cross-  
11 examination. What has the plaintiff shown to the  
12 Court to indicate what the loss of profits were or  
13 what any of the financial or cost accounting facts of  
14 this company were?

15 Nothing.

16 All they have is one contract, Buy for 30 and  
17 another contract to sell for 67 and therefore by  
18 arithmetic that is the loss of net profit. Net profit  
19 by accounting procedures and by accounting testimony  
20 from the books and records. That is not only reasonable  
21 but it is the only relevant and material way to show  
22 loss of net profit.

23 I cannot, representing the defendant, attack the  
24 net profit claim of \$30,000 because if I do the  
25 arithmetic 30 from 60 is 30. But I must be in a

9 1 position to attack the underlying structure of Thermal's  
2 business to see whether the loss of profits is just a  
3 subtraction from two different contracts.  
4

5 So there is no question but that no foundation  
6 has been set forth here to show what the loss of profit  
7 was.

8 We can walk out of this Courtroom today and  
9 concede for argument's sake that York Shipley was 100  
10 percent responsible for this whole shebang and the  
11 Court has nothing upon which to base a decision to give  
12 Thermal \$1 in loss of profits.

13 Now it is an exercise almost in futility for  
14 the Court to determine whether York Shipley had the  
15 right not to deliver or whether Thermal cancelled,  
16 because whatever conclusion the Court comes to there is  
17 no testimony or evidence as to the loss of profit in  
18 this whole case.

19 As far as reputation is concerned, who  
20 published about reputation, did Mr. Shuman go running  
21 out to the industry and say that Thermal Unit's  
22 reputation had been harmed because of the failure to  
23 perform on the contract?

24 Did Peters himself go out and ruin his own  
25 reputation by telling the industry that he couldn't

\* \* \*

14 1

81a

298

\* \* \*

2 have -- and I am going to try to decide this case very  
3 promptly, I have listened to the evidence, I have  
4 listened to your summations, but I would like to get  
5 the exhibits which relate to what we call the Tuck  
6 transaction and those which relate to the Imperial  
7 transaction, you know, segregated out even though they  
8 are from both sides.

9 You understand.

10 MR. THALER: Yes, sir.

11 MR. MADDEN: There is one or two in particular,  
12 there is the March 7th letter, your Honor, which  
13 refers to both transactions, other than that they can  
14 be segregated out.

15 THE COURT: I don't care, I am more interested  
16 in splitting them into two transactions.

17 MR. THALER: Let me look at them.

18 THE COURT: That is the Tuck and the Imperial,  
19 into Plaintiff's and Defendant's.

20 MR. THALER: We will put them in the middle and  
21 we will put the Tuck and Imperial here and there.

22 (There was some conversation between  
23 Mr. Madden and Mr. Thaler.)

24 MR. THALER: We have a conflict.

25 THE COURT: Don't bother to argue over them,

\* \* \*

\* \* \*

1  
2 fabrication or delivery, that's just to mention but  
3 a few of many provisions which appear to be standard  
4 provisions, and which indeed are not dissimilar from  
5 those in the purchase order of Tuck, the ultimate  
6 customer for the boiler in question.

7 Under these circumstances the Court finds that  
8 the plaintiff has not sustained by a fair preponderance  
9 of the evidence that York Shipley was in default in  
10 respect to not meeting delivery dates as promised or  
11 even extended delivery dates as referred to in a  
12 number of the exhibits in evidence, specifically  
13 Plaintiff's Exhibit 4 or Plaintiff's Exhibit 5 or  
14 Plaintiff's Exhibit 7. The Court finds from the  
15 evidence that at the time in question a condition of  
16 emergency had developed in the steel industry, that the  
17 particular boiler in question required a special kind  
18 of heavy steel plate for which there was but a limited  
19 supply, namely one company, Bethlehem Steel Company,  
20 and one plant of that company at Sparrowpoint Maryland  
21 plant; that because of a contemporaneous or prior  
22 steel strike, steel companies had shut down their  
23 furnaces, had fallen down in their production of steel  
24 inventory, restricted their customers such as York  
25 Shipley to allotments and that in fact the requisite



1  
2 steel for the plaintiff of fabrication for this boiler  
3 in question did not arrive at the York plant until on  
4 or about December 31, 1974, over a month and a half  
5 before the original promised delivery date. However,  
6 thereafter fabrication did go forward and at some  
7 point on or about March 20, 1975 this boiler would have  
8 been ready for delivery, but according to plaintiff's  
9 own Exhibit 9 the order had been cancelled as per a  
10 telegram from A.P. Neilsen to York Shipley to Thermal  
11 Unit Corp., dated March 20, 1975, and this was on the  
12 basis that Thermal Unit had afforded no check pursuant  
13 to the terms of the original contract calling for  
14 payment by certified check in advance of shipment.

15 The Court therefore finds on all the evidence,  
16 not really that referred to in these comments and on  
17 the exhibits in evidence that plaintiff has failed to  
18 establish his first cause of action relating to the  
19 Tuck Industry transaction.

20 Now, we turn to the second transaction which is  
21 the subject matter of the second alleged cause of  
22 action relating to an order for three boilers placed  
23 by Thermal Unit Corp., plaintiff, with York Shipley  
24 to be delivered to Imperial Finishing, a concern hav-  
25 ing its place of business in the Borough of Brooklyn,

\* \* \*

1  
2 MR. MADDEN: If you look on Imperial's quota-  
3 tion you'll see the price that Thermal was charging  
4 Imperial, if you look on York Shipley's --

5 THE COURT: I see what you mean.

6 MR. MADDEN: If the Court would direct its  
7 attention to the quotation between Thermal and  
8 Imperial, Thermal was charging Imperial \$27,200.

9 THE COURT: 25, 5, I think.

10 MR. MADDEN: There is a second sheet.

11 THE COURT: I only have one here.

12 MR. MADDEN: Your Honor, may I look at the  
13 exhibit please?

14 It says \$25,500 plus \$1700 for blow-down valves,  
15 and that was the price. Isn't that what it says?

16 MR. THALER: No.

17 THE COURT: That's the price that I accept.

18 MR. THALER: The bottom price --

19 THE COURT: That's the price I accept.

20 MR. MADDEN: It does say additional, the  
21 additional price to that quoted herein.

22 THE COURT: Let me have it in. I feel --

23 MR. THALER: Something about accessories.

24 THE COURT: That the price is stated as  
25 \$25,500, the way I figure it out, based on the

1  
2 memorandum of York Shipley as to what the amount of  
3 the certified check should be, \$21,305, the difference  
4 is \$4,195, even though I recognize, as you say, have  
5 office overhead and a lot of other expenses, the main  
6 fact of the matter is --

7 MR. THALER: Not net profit; show net profit  
8 not gross profit.

9 THE COURT: Bear in mind he unquestionably  
10 had overhead in connection with his activities in  
11 working on this particular order; so in My opinion  
12 the plaintiff is entitled to judgment on its second  
13 cause of action in the total sum of \$4,195, and I  
14 direct the entry of judgment in favor of the plaintiff  
15 accordingly.

16 MR. THALER: We don't agree on the damage.

17 THE COURT: If you want to submit a formal  
18 judgment providing for the tax cost you may feel free  
19 to do that, but service on your adversary was suf-  
20 ficient notice to give him an opportunity --

21 MR. THALER: Does the defendant get costs on  
22 the first cause of action?

23 THE COURT: I don't know you may have --well--

24 MR. THALER: Unless the judgment for \$4100 is  
25 without cost.

\* \* \*

BEST COPY AVAILABLE

PLAINTIFF'S EXHIBITS IN EVIDENCE

## EXHIBIT 1 - PURCHASE ORDER

86a

**TUCK INDUSTRIES INC.**INVOICES MUST BE SUBMITTED IN DUPLICATE TO  
LEFEVRE LANE, NEW ROCHELLE, N.Y. 10801 (212) WE35600Thermal Unit Corp.  
P.O. Box 26  
Franklin Square, LI., N.Y.  
11010

PURCHASE ORDER

COPY OF EX. #C. ID TUCK  
YORK 5/16/74 WE HAVE A SENSE OF VALUE

SHIP TO AS SHOWN BY "X" BELOW

X 248 TIORANDA AVE., BEACON, N.Y. 12508  
LEFEVRE LANE, NEW ROCHELLE, N.Y. 10801  
420 NORTH ILLINOIS AVE., CARBONDALE, ILL. 62901  
1 DEPOT PLAZA SOUTH, TARRYTOWN, N.Y. 10591

Attn: G. Shuman

Thermal  
Unit

P.O. NUMBER

TT  
04320

DATE

7/30/74

☐ CONFIRMED ON  
TO☒ THIS IS AN ORIGINAL ORDER.  
PLEASE FILL PROMPTLY☒ TAXABLE D. P. NO. 001970☐ TAX  
EXEMPT NO

DO NOT DUPLICATE

TERMS PREPAID COLLECT F.O.B. POINT

SHIP VIA

TO ARRIVE BY  
11/10/74  
or before

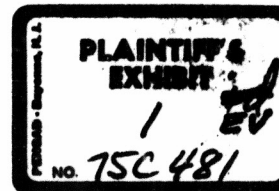
REC'D	QUANTITY	UNIT	DESCRIPTION	PRICE	UNIT	CODE	WILL SHIP
	1		York-Shipley boiler, Model #596- SPHC-700-N/6 designed for 150 PSI and to provide 27,600# steam per hour equivalent to 800 H.P.  AS PER QUOTE # 1343/74 (copy attached) DELIVERY DATE: 11/10/74 or before.  PRE-SHIPMENT NOTIFICATION DEMANDED TWO WEEKS OR MORE PRIOR TO DELIVERY.  INSTALLATION COMPLETED AND UNIT MUST BE FULLY OPERABLE WITHIN TWO WEEKS FOLLOWING DELIVERY ON 11/10/74 OR BEFORE.	66,500.00	net	CR8-1850	
SPECIAL CHARGES:							

## INSTRUCTIONS TO SELLER:

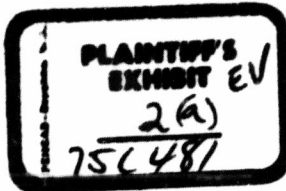
• ADVISE CARRIER •

▶ NO DELIVERIES ACCEPTED AFTER 3:00 P. M. ◀

1. OUR PURCHASE ORDER NUMBER AND PREFIX LETTER MUST APPEAR ON YOUR INVOICE, FREIGHT BILL, PACKING SLIP, ALL PACKAGES, LABELS AND ALL CORRESPONDENCE PERTAINING TO THIS ORDER.
2. A PACKING SLIP MUST ACCOMPANY EACH SHIPMENT.
3. ACCEPTANCE COPY OF THIS ORDER MUST BE EXECUTED AND RETURNED TO PURCHASING DEPARTMENT PROMPTLY.
4. ALL PREPAID CHARGES MUST BE ACCOMPANIED BY CARRIER'S INVOICE.
5. THE CLAUSES PRINTED ON THE REVERSE SIDE HEREOF AND ANY SUPPLEMENTAL CONDITIONS ATTACHED HERETO, ARE ESSENTIAL TERMS OF THIS ORDER.



PER



# QUOTATION

All orders for equipment must refer to the quotation number listed below.

COMBUSTION ACCESSORIES CORP.  
Box 115; Highbridge Station; Bronx 10452  
212 293-3000

H 62326

To Thermal Unit Fuel Corp. ATT: Mr. Ken Peters No. 4875-J  
Address 549 W. Hempstead Tpke.; W. Hempstead, N.Y. 11552 Date July 16, 1974  
SUBJECT: Tuck Tape From JOHN A. JANSSENS, P.E.

We are pleased to quote on equipment for: TOTAL NET COST \$35,750.00

One (1) York YS Power High Pressure Steam Pak Generator described as follows:  
(Quantity)

Model No. 596 SPH-700-6N  
Approx. Boiler HP 700  
Equivalent Direct Radiation Steam 97600  
BTU Input Per Hour 29,300,000

Design Pressure 150# Fuel #6 oil & gas  
Heating Surface (Water Side - Fire Side) 3500  
Steam Pounds Per Hour 24150  
Output 23,450,000

Prices to include the following additional equipment:

Air atomizing burner.

One (1) year warranty on parts.

- Manual potentiometer.

- McDonnell-Miller #157 low water cut-off. Low water & flame failure alarm with

- Second low water cut-off 150#, steam.

Three (3) signal lights.

2"Ø front observation port.

Oil pump set.

Elec. nozzle preheater assembly.

Vertical vent connection.

Air flow safety switch.

- Voltmeter.

2" fibreglass insulation & metal jacket.

Modulation assembly.

Manual reset pressure control.

Low water & flame failure alarm with silencing relay.

Front & rear door hinges.

Continuous oil circulation 110/220.

#6 oil preheater assembly, steam.

Visc. comp. & elec. heater.

Stack thermometer, loose.

Factory test firing; UL & ASME Cert.

Factory Mutual Certification.

SUBJECT TO CANCELLATION WITHOUT PENALTY  
IF DELIVERY IS NOT AS OUTLINED. K.E.P.

To be installed at \_\_\_\_\_

by \_\_\_\_\_

as installing contractor, in strict accordance with provisions of York YS Power Installation Manual # \_\_\_\_\_

F. O. B. Factory Current Approximate  
York, Pa. Characteristics 208/60/3 Shipping Weight 51700#

Terms: Certified check in advance of shipment. Approximate Date of Shipment 11/10/74 or B/4

AFTER CREDIT APPROVAL

The terms and conditions of sale printed on the reverse side of this sheet, unless expressly excepted herein, are part of this quotation.

This quotation is subject to change or withdrawal without notice. If accepted by the purchaser it shall become a contract when approved at York, Pa., by an authorized representative of York-Shipley, Inc. and may then be modified by written agreement only. No statements or understandings relating to the subject matter, other than those set forth herein, shall be binding on York-Shipley, Inc. (hereinafter referred to as the "company").

QUOTATION FURNISHED BY:

representing: York-Shipley, Inc.

DO NOT WRITE BELOW

Date ACCEPTED July 17 1974

By: [Signature]

York, Pa., 197

APPROVED FOR YORK-SHIPLEY, INC.

## EXHIBIT 3 - YORK-SHIPLEY INVOICE

88a

## SHIPPING &amp; BILLING INSTRUCTIONS

Master Express - Prepaid  
Carrier to Call Center Island at  
(514) 234-1535 48 hrs. before  
delivery

*Thermal Unit*

FBO

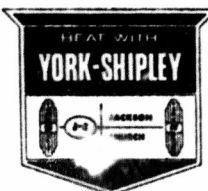
Y-S ORDER NO. **N-33941**  
**KA**

DATE ENTERED	DATE RECEIVED	SHIPMAN	DIVISION	ZONE	S. C. C.	CODE
9-13-72	10/10/72	66-293 ✓	32.0	000		

**YORK · SHIPLEY, Inc.**

P. O. BOX 349

YORK, PENNSYLVANIA 17405

**INVOICE**

DUNS #00-300-3654

Y-S ORDER NO. **N-33941**  
**KA**S  
O  
L  
D  
T  
O

Center Island Mechanical Corp.  
1316 L.I. Motor Highway  
Hempstead, N.Y. 11767

S  
H  
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P  
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O

Will Advise

To: Industrial Bldg. Hempstead, N.Y.

CUSTOMER ORDER NO.	F.O.B.	VIA	INVOICE NUMBER
2006	York, Pa. Frt. Allowed		
CUSTOMER'S ORDER DATE	CUSTOMER CODE	TERMS	INVOICE DATE
9-13-72		Net 30 Days	

PART NUMBER	DESCRIPTION	Back Ordered	Quan. Ordered	Quan. Shipped	Unit Price	Amount
95590	Item-1 240 GPM-150-3 140012 Hot Water Boiler 440/60/3		1			
TOTAL BILLING						\$ 7800.00
# 3						

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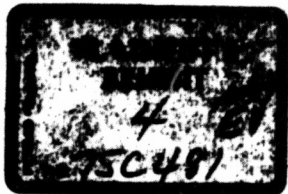


## EXHIBIT 4 - MEMO TO THERMAL UNIT DATED AUGUST 9, 1974

TO <i>Thermal Unit Corp</i>	FROM <b>YORI - SHIPLEY, INC.</b> P.O. BOX 349 YORK, PA. 17405
ATTN: <i>Kes Peters</i>	DATE <i>8/9/74</i>
SUBJECT <i>H-62326 Truck Tapes Corp</i>	

## MESSAGE:

This is to advise that subject order will be shipped upon receipt of your Certified Check in advance.  
The amount of this order is as follows.



Selling Price \* 35,750.00  
Less 1% 357.50  
35,392.50

ORIGINATOR-DO NOT WRITE BELOW THIS LINE

REPLY TO

SIGNED

Freight 795.00  
\* 36,187.50

Therefore your Certified Check should be in the amount of \$36,187.50.

Anticipated shipping date is the week of Nov 25, 1974.

cc: *Carl. Cratz*

DATE

*B. Dyer*

SIGNED

*R. W. Dabals**Cont. Rec. Corp*

SEND PARTS 1 AND 3 INTACT-PART 1 WILL BE RETURNED WITH REPLY

RM-87

RETURN TO ORIGINATOR



90a

EXHIBIT 6 - DELAY IN SHIPPING ADVICE DATED OCTOBER 9, 1974

YORK-SHIPLEY, INC.  
YORK PENNSYLVANIA

10/9/74

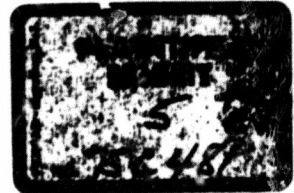
*Thermal Unit Corp*  
*P.O. Box 26*  
*Franklin Square, N.J., N.J. 11010*

Ref: Order No. *H-62326* - *Thermal Unit Corp*

Due to problems encountered in procuring materials and/or delays in production scheduling, the shipping promise on subject order has been delayed to the week of *Jan. 6, 1975*.

Very truly yours,

YORK-SHIPLEY, INC.



CRS/lkc

*C. W. Sabold*  
C. W. Sabold  
Industrial Sales Department

*cc Comb Ace Corp*

EXHIBIT 7 - DELAY IN SHIPPING ADVICE DATED SEPTEMBER 30, 1974

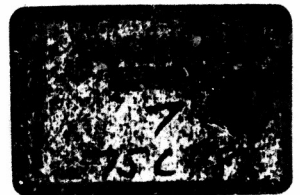
YORK-SHIPLEY, INC.  
YORK, PENNSYLVANIA

9/30/74

*Thermal Unit Corp.*

*P.O. Box 26*

*Franklin Square, L.I., N.Y. 11010*



Ref: Order No. H-62326 *Tuck Tape Corp.*

Due to problems encountered in procuring materials and/or delays in production scheduling, the shipping promise on subject order has been delayed to the week of Dec. 16, 1974.

Very truly yours,

YORK-SHIPLEY, INC.

*C. W. Sabold*

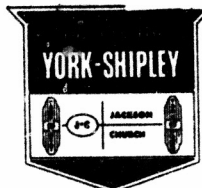
C. W. Sabold  
Industrial Sales Department

CRS/lkt

*cc: Comb Air Corp.*

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**YORK · SHIPLEY, Inc.**



YORK, PENNSYLVANIA  
17405

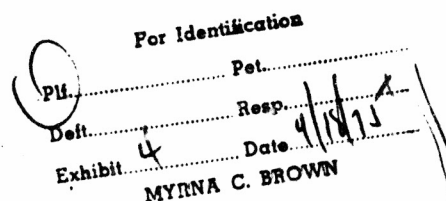
*Manufacturers of the world's most complete line of heating equipment*

November 5, 1974

Thermal-Unit Corp.  
549 Hempstead Turnpike  
West Hempstead, L.I., N.Y. 11010

Attention: Mr. Ken Peters

Subject: H-62326 596-SPN-700-N6  
Tuck Tape Corp. Beacon, N.Y.



Dear Ken:

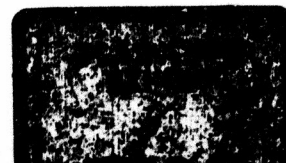
Last July we received your order #4875-J for the subject boiler which we promised delivery November 10, 1974. This commitment on our part was based on anticipated promised delivery of boiler plate steel from our steel suppliers. As you know, we are at the mercy of these mills. We have been subject to "loosing" two month deliveries from the mills. By this I mean we have received "no allotment" for two months. This does not mean they are two months behind schedule. This means we did not or will not get this quantity of steel.

As a matter of fact, the steel for the subject boiler has just arrived in York.

Now, as far as your customer is concerned, we know we have given three different deliveries the last being January 6, 1975. This late can still be met.

However, a decision must be made in the very near future.

We were offered<sup>to</sup> finish the boiler and store same until August, 1975, delivery and maintain the original selling price. Now, Ken, you are a business man and know you purchased the boiler at a very good price. In fact, the boiler has gone up approximately 17% since the order was received. Also, to hold the boiler price would cost York-Shipley approximately 12% in interest charges. To make a long story short, we have two alternate propositions:



1. We finish the boiler and invoice you. We then ship the boiler to be stored in a New York warehouse.
2. We finish the boiler and invoice you. We then hold in York for delivery at your convenience.

Naturally, there is a third choice and that would be to formally cancel the order.

Would you please contact your customer and decide what you prefer to do.

We are sorry this situation arose but we have to repeat - we are at the mercy of our suppliers.

Best personal regards,

YORK-SHIPLEY, INC.

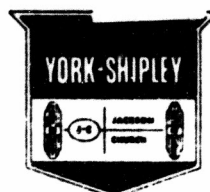


H. J. Nielsen  
Northeastern Industrial Regional Mgr.

HJN/lkt

cc: G. Parker  
C. Sabold  
C. Creitz  
Combustion Accessories Corp.  
H-62326

**YORK · SHIPLEY, Inc.**



YORK, PENNSYLVANIA  
17405

*Manufacturers of the world's most complete line of heating equipment*

March 20, 1975

CERTIFIED RETURN RECEIPT REQUESTED



Thermal Unit Corp.  
Box 26  
Franklin Square, New York 11010

Attention: Mr. K. E. Peters

RE: H-62327, H-62479 and H-62326

Gentlemen:

This letter will clarify our position on the three orders listed above.

H-62327

This order has been cancelled as per telegram from H. J. Nielsen dated February 25, 1975. The boiler was produced in November 1974 and we have been attempting to have you submit payment for this boiler, as per terms of this sale, since November 11, 1974 with no success. We, therefore, found it necessary to cancel this order due to your failure to meet our payment terms.

H-62479

Our representative, Mr. John Janssens, has been advised by Imperial Finishing that the three (3) boilers on H-62479 are no longer required as his tenant, who was to use these units, has allegedly filed under Chapter XI and therefore no longer wants the boilers. We, consider this order cancelled.

H-62326

As you are aware this boiler was delayed due to the delay by our supplier in furnishing steel for the fabrication. Upon receipt of the steel we were advised that Tuck Tape requested this boiler be further delayed until the fall of 1975.

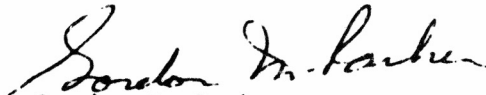
March 20, 1975

In order for us to put this order in production we will be required to update our selling price to current price level of \$42,934.00. In view of your refusal to pay your past due account and your failure to submit the advance payment on order H-62327, we require a down payment from your company of 25% or \$10,734.00.

Down payment must be by certified check and must be in our hands before we start fabrication of boiler. The remaining 75% must be paid in advance of shipment by certified check.

Very truly yours,

YORK-SHIPLEY, INC.



Gordon M. Parker  
Vice President, York Sales

GMP/paf

# TU

## EXHIBIT 10 - THERMAL UNIT QUOTATION DATED AUGUST 18, 1974 96a

### THERMAL-UNIT CORP.

DISTRIBUTORS YORK-SHIPLEY PACKAGED BOILERS

## QUOTATION

P. O. BOX 26

FRANKLIN SQUARE, L.I., N.Y. 11010

TEL. (516) 352-0180

M-62479 L2 2 12

TO: \_\_\_\_\_ NO. 1660

ADDRESS: \_\_\_\_\_ DATE: 8-16-74

(<sup>2</sup>/<sub>3</sub>) YORK-SHIPLEY Packaged Boiler/s Model 240-SPHV-60-N/2

Boiler Horse Power 60 Fuel No. 2 oil and gas Design Pressure 150 p.s.i.

Current Char. 208/60/3--110/60/1 controls Approx. Ship. Wt. 4,000 lbs.

Boiler/s to be complete with Fuel Burning Equipment, Accessories, and Controls as outlined in the attached brochure as well as the following Optional Equipment:

Totally enclosed panel  
Electronic safety control  
Gas-electric ignition  
Fuel changeover switch  
Three signal lights  
Safety limit control  
Integral fuel oil pump

Vertical vent connection  
L.W.C.O.--pump control  
Main gas train  
Manual reset pressuretrol  
4" alarm bell  
Low fire start  
High-low firing

BLOW DOWN VALVES

NOTE: F.M. accessories for two (<sup>3</sup>/<sub>X</sub>) boilers are ~~\$1,150.00~~ additional to price quoted herein. 1,700 X 1.

Feed water system to include one (1) 150 gallon tank, tank stand, two (2) 150 p.s.i. feed water pumps, make-up assembly and one (1) 30-H feed water tank heater installed.

\$25,500 P. X 1.

Price: ~~\$18,400.00~~ - 1 1/2% CK ADV.

Approx. Date of Shipment: eight - ten weeks

Factory Pgt. Allowed ~~3%~~ job site  
VIA TRUCK - NOT UNLOADED

To Be Installed At: 1155 MAN. AVE. BROOKLYN.

By: \_\_\_\_\_

As Installing Contractor, in strict accordance with provision of Y/S Installation Manual.

The terms and conditions of sale printed on the reverse side of this sheet, unless expressly excepted herein, are part of this quotation.

This quotation is subject to change or withdrawal without notice. If accepted by the purchaser, it shall become a contract when approved at York, Pa., by an authorized representative of York-Shipley, Inc. and may then be modified by written agreement only. No statements or understandings relating to the subject matter, other than those set forth herein, shall be binding on York-Shipley, Inc. (hereinafter referred to as the "company").

Date Accepted: \_\_\_\_\_ 197

DO NOT WRITE BELOW

Company: \_\_\_\_\_

York, Pa. \_\_\_\_\_ 197

By: *James J. [Signature]* Title: *Purch.*

Approved for York-Shipley, Inc.

To be signed at York, Pa.

JOB FABRICATED BOILERS / OIL - GAS AND COMBINATION BURNERS  
PARTS - INSTALLATION / SERVICE / COMBUSTION CHAMBERS / RETUBING





## QUOTATION

All orders for equipment must refer to the quotation number listed below.

COMBUSTION ACCESSORIES CORP.  
Box 115; H'bridge Stat.; Bronx 10452  
212 293-3000

H 62479

To Thermal Unit Corp. ATT: Mr. Ken Peters No. 4885-J  
Address 549 W. Hempstead Tpke.; W. Hempstead, L.I., N.Y. 11552 Date July 22, 1974  
SUBJECT: Imperial Finishing; 1155 Manhattan Ave.; Brooklyn From JOHN A. JANSSENS, P.E.

We are pleased to quote on equipment for: TOTAL NET COST \$6386 each or \$19,158 for three (3)

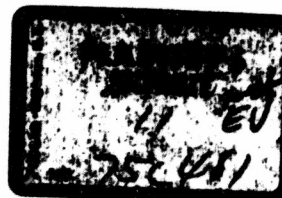
Three (3) York YS Power NYC High Pressure Steam Generators described as follows:  
(Quantity)

Model No. 240 SPH-60-2N  
Approx. Boiler HP 60  
Equivalent Direct Radiation Steam 8375  
BTU Input Per Hour 2,980,000

Design Pressure 150# Fuel #2 oil & gas  
Heating Surface 1440 sq ft (Fire Side) 99.6  
Steam Pounds Per Hour 2070  
Output 2,009,000

Prices to include the following additional equipment:  
FV Burner.

One (1) year warranty on parts.  
Gas-electric ignition.  
PBC-5-5022 Fireeye combustion control.  
2" fibreglass insulation & metal jacket.  
Hi-lo firing assembly.



~~XXXXXX XXXX XXXX XXXX XXXX XXXX XXXX~~

McDonnell-Miller #157 low water cut-off.  
Manual reset pressuretrol.  
Three (3) signal lights.  
Low water & flame failure alarm w/silencing relay.  
Tandem blow down valve "Y" type; 1 1/4" quick opening.  
Factory test firing; UL & ASME Certification.  
Factory Mutual Certification.  
Start-up and service by Thermal Unit.

To be installed at \_\_\_\_\_  
by \_\_\_\_\_

as installing contractor, in strict accordance with provisions of York YS Power Installation Manual # \_\_\_\_\_

F. O. B. Factory Current Characteristics 208/60/3 Approximate Shipping Weight 4040# each  
York, Pa.

Terms: ~~100% advance~~ 1% check in advance. Approximate Date of Shipment 4 - 6 weeks

AFTER CREDIT APPROVAL

The terms and conditions of sale printed on the reverse side of this sheet, unless expressly excepted herein, are part of this quotation.

This quotation is subject to change or withdrawal without notice. If accepted by the purchaser it shall become a contract when approved at York, Pa., by an authorized representative of York Shipley, Inc. and may then be modified by written agreement only. No statements or understandings relating to the subject matter, other than those set forth herein, shall be binding on York Shipley, Inc. (hereinafter referred to as the "company").

QUOTATION FURNISHED BY:

*John A. Janssens*  
representing: York Shipley, Inc. DO NOT WRITE BELOW

Date ACCEPTED 8/1/1974

By *[Signature]*

York, Pa., 197

APPROVED FOR YORK-SHIPLEY, INC.



# QUOTATION

98a

COMBUSTION ACCESSORIES CORP.  
Box 115; H'bridge Station  
Bronx, New York 10452  
212 293-3000

H 62479

To Thermal Unit Corp. ATT: Mr. Ken Peters No. 4885-J cont.  
Address 549 W. Hempstead Tpke.; W.Hempstead, NY 11552 Date July 22, 1974  
SUBJECT: Imperial Finishing; 1155 Manhattan Ave.; Brooklyn From JOHN A. JANSSENS, P.E.  
We are pleased to quote as follows: TOTAL NET COST ~~XXXXXX~~ \$2363.00

We shall be pleased to furnish Condensate tank and Feedwater pump assembly complete with the following equipment.

- One (1) 150 gallon tank.
- One (1) tank stand.
- Duplex feedwater pump; 150 psi; 3 hp 3450 rpm; 208/60/3
- One (1) Tank heater assembly, model 30H.
- One (1) #221 feeder, assembled.
- ~~XXXXXX~~
- One (1) Hi pressure return assembly "C".

Freight to be prepaid and added to invoice.



F. O. B.	Current	Approximate
York, Pa.	Characteristics	Shipping Weight
Terms: <del>XXXXXX</del>	1% check in advance.	Approximate
		Date of Shipment 4 - 6 weeks

The terms and conditions of sale printed on the reverse side of this sheet, unless expressly excepted herein, are part of this quotation.  
This quotation is subject to change or withdrawal without notice. If accepted by the purchaser it shall become a contract when approved at  
by an authorized company representative and may then be modified by written agreement only. No statements or understandings relating to the subject matter, other than those set  
forth herein, shall be binding on (hereinafter referred to as the "company".)

## QUOTATION FURNISHED BY:

*John A. Janssens*  
representing: York-Shipley, Inc.

Date ACCEPTED 6/21 1974 197

APPROVED FOR

*Ken Peters*

## EXHIBIT 12 - MEMO TO THERMAL UNIT DATED AUGUST 28, 1974

TO Thermal Unit Corp. FROM **YORK - SHIPLEY, INC.**  
**P. O. BOX 349**  
**YORK, PA. 17405**

ATTN: Ken Peters DATE 8/26/74

SUBJECT H-62479 Imperial Finishing

MESSAGE: This is to advise that subject order will be shipped upon receipt of your Certified Checks in advance. The amount of this order is as follows.



Selling price \$ 21,521.00  
 Less 1% 215.21  
21,305.79

ORIGINATOR-DO NOT WRITE BELOW THIS LINE

REPLY TO →

SIGNED

REPLY

Freight 375.00  
21,680.79

Therefore your Certified Check should be in the amount of 21,680.79.

cc: Carl C. PettyBetty DineenComb. Acc. Corp.

SIGNED

R. W. Labadie

SEND PARTS 1 AND 3 INTACT-PART 1 WILL BE RETURNED WITH REPLY

RM-87

RETURN TO ORIGINATOR

100a

EXHIBIT 13 - LETTER OF CONFIRMATION TO YORK-SHIPLEY

For Identification

PIL	Pat.
Def.	Resp.
Exhibit 7	Date 9/18/75

MYRNA C. BROWN

25 September 74

York Shipley Inc.  
York Penna

ATTN: ~~Harry Wilson~~  
RE: H-62479

Gentlemen:

This is to confirm our conversation that we will not hold you responsible for meeting the Criteria of the New York City Department of Air Pollution on the three (3) 240-SPHV-60-N/2 boilers ordered under the above H-62479.

Very truly yours,

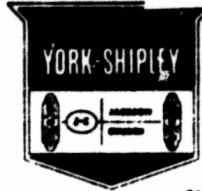
Kenneth E. Peters  
THERMAL-UNIT CORP.

KEP:cd  
cc:J. Jannsens



BEST COPY AVAILABLE

EXHIBIT 14 - LETTER TO THERMAL UNIT REQUESTING CANCELLATION 101a  
DATED MARCH 7, 1975 WITH ATTACHED MEMO  
**YORK · SHIPLEY, Inc.**



(pp. 101a-102a)  
YORK, PENNSYLVANIA  
17405

*Manufacturers of the world's most complete line of heating equipment*

March 7, 1975

For Identification  
P.L. \_\_\_\_\_  
Date \_\_\_\_\_  
Exhibit 6  
MYRNA C. PROCTOR  
9/18/75

Thermal-Unit Corp.  
549 Hempstead Turnpike  
West Hempstead, L.I., N.Y. 11010

Attention: Mr. Ken Peters

Subject: H-62479 Imperial Finishing Co.

Dear Ken:

As you know, we have repeatedly attempted to have your company acquire a letter from your customer relative to his accepting the boilers less the New York City "D.A.R." approval.

This has taken so much time and with price increases, etc., I asked Mr. John Janssens to check with Imperial Finishing Co. to see if they still wanted the boilers, as we at York were concerned if we could still fulfill the order at the original quoted price.

John complied with my request, hoping to "save" the order and now sent me the attached memo.

Please advise if this order will be officially cancelled as far as you are concerned or what do we do now.

Very truly yours,

YORK-SHIPLEY, INC.

*H. J. Nielsen*  
H. J. Nielsen

Northeast Industrial Regional Manager

HJN/paf

attach.

cc:-Comb. Access.  
G.M. Parker  
C. Sabold  
C. Creitz

## COMBUSTION ACCESSORIES CORP.

P. O. BOX 115, HIGHBRIDGE STATION • BRONX, NEW YORK 10482 • PHONE 293-3000

York Shipley Inc  
P.O. Box 349  
York, Pa., 17405  
Mr. Harry Nielson

SUBJECT Imperial Fumig Co  
1155 Manhattan Ave  
Bklyn. N.Y.  
DATE 11-62479  
3. SPH-210-60-2/N

## MESSAGE

In view of our pending Dept of Air Resources approval, I thought it best to check with Mr Eugene Gross of Imperial Fumig Co (212-389-5700), concerning the above order.

I explained to him that despite the fact that Thermal Unit (Ken Peters) had given us a letter to proceed with fabrication of units and indicating that he would not need D.A.R. approval, York Shipley decided not to chance building the units without approval.

The next point in order was to see if he still wanted the units in view of pending approval, and if so, to restate this order and advise him of delivery time etc.

## REPLY

Unfortunately, he advised me that the tenant, who was to use these units, has just gone into Chapter 11. So that puts everything in a wait and see situation. If he can reorganize, the order will be restated, - If not - we loose out!

It is really a shame that all this effort is wasted. We realize that you tried with the D.A.R. for early approval, but apparently only God can move mountains.

Best Regards.

John J. Janssen

BEST COPY AVAILABLE

UNITED STATES COURT OF APPEALS  
SECOND CIRCUIT

THERMAL UNIT CL CORP.,

Plaintiff-Appellant,

- against -

YORK-SHIPLEY, INC.,

Defendant-Respondent.

Index No.

Affidavit of Service by Mail

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

I, Eugene L. St. Louis, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at 1235 Plane Street, Union, New Jersey 07083. That on the 11<sup>th</sup> day of November 1976 deponent served the annexed

appendix upon Goldman, Horowitz & Chernoff attorney(s) for

Defendant-Respondent in this action, at P.O. Box 630 390 East Old Country Rd.  
Mineola, N.Y. 11501

the address designated by said attorney(s) for that purpose by depositing a true copy of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Depository under the exclusive care and custody of the United States Post Office Department, within the State of New York.

Sworn to before me, this 11<sup>th</sup>  
day of November 1976.

Beth A. Hirsh  
BETH A. HIRSH  
NOTARY PUBLIC, State of New York  
No. 41-4623156  
Qualified in Queens County  
Commission Expires March 30, 1978

Eugene L. St. Louis  
Print name beneath signature  
Eugene L. St. Louis